

BUSINESS INTERRUPTION INSURANCE TEST CASE

DRAFT TRANSCRIPT

OF DAY 1 OF SUPREME COURT APPEAL (16 NOVEMBER 2020)

What follows is a **draft** transcript.

A final transcript will be published when it is available.

OPUS2

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

Day 1

November 16, 2020

Opus 2 - Official Court Reporters

Phone: +44 (0)20 3008 5900

Email: transcripts@opus2.com

Website: <https://www.opus2.com>

1 Monday, 16 November 2020
 2 (11.00 am)
 3 LORD REED: Welcome to the Supreme Court of the
 4 United Kingdom where today we are beginning a four-day
 5 hearing of appeals in proceedings brought by the
 6 Financial Conduct Authority against a number of
 7 insurance companies.
 8 The proceedings are test cases concerned with
 9 business interruption cover in insurance policies. The
 10 purpose of the proceedings is to determine what
 11 liability, if any, the policies imposed on the insurers
 12 towards businesses that have been affected by the
 13 COVID-19 pandemic.
 14 I am hearing the appeal with four other members of
 15 the court, whom I will introduce now. The
 16 Deputy President, Lord Hodge.
 17 LORD HODGE: Good morning.
 18 LORD REED: Lord Briggs.
 19 LORD BRIGGS: Good morning.
 20 LORD REED: Lord Hamblen.
 21 LORD HAMBLÉN: Good morning.
 22 LORD REED: And Lord Leggatt.
 23 LORD LEGGATT: Good morning.
 24 LORD REED: We are going to be hearing today and tomorrow
 25 morning the submissions made on behalf of the insurance

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1 companies who are appealing against aspects of the
 2 decision of the court below which went against them.
 3 The insurance companies are Arch Insurance, Argenta,
 4 Hiscox, MS Amlin Underwriting, QBE UK,
 5 Royal & Sun Alliance, and later in the proceedings we'll
 6 be hearing from Zurich.
 7 The first submissions are going to be made by
 8 counsel on behalf of QBE. That's Michael Crane QC.
 9 So I will turn now to Mr Crane and invite him to
 10 open his submissions.
 11 Submissions by MR CRANE
 12 MR CRANE: Good morning, my Lord. I, as you say, appear for
 13 the fifth appellant, QBE, and before I address the court
 14 may I say on behalf of all parties that we are very
 15 grateful to the court for bringing this appeal on with
 16 such speed and we appreciate the burden that must have
 17 involved, in particular in relation to late receipt of
 18 a mass of documentation. So we are grateful for that.
 19 My Lord, the order of speeches on behalf of insurers
 20 will roughly follow the plan of the judgment, that is to
 21 say we will address the so-called disease clauses first
 22 before turning to those clauses that involves measures
 23 restricting or preventing access or causing an inability
 24 to use the premises.
 25 I have been allocated from the total time given to

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1 insurers an hour and 35 minutes to be split between my
 2 appeal and responding to Mr Edelman's appeal and
 3 I intend, if I may, to open my appeal in no longer than
 4 an hour and ten minutes, but I will see how it goes and
 5 bank what's left for my reply.
 6 I should also say that, in order to avoid
 7 duplication and because time is tight, there are two
 8 issues in which my clients, QBE, will adopt the
 9 submissions of other insurers.
 10 The first concerns the role of "but for" causation,
 11 so-called "but for" causation, at law and under the
 12 trends clauses in each of the policies and in particular
 13 the implications for those issues of the decision in
 14 Orient-Express Hotels v Generali. Now, on this clutch
 15 of issues, I will adopt the submissions made on behalf
 16 of Amlin by Mr Kealey.
 17 The second issue is that described in the written
 18 cases as pre-trigger losses. Now, this issue
 19 potentially affects all insurers, but it has a more
 20 profound impact on those writing restrictions on
 21 prevention of cover policies and it figures very largely
 22 in Mr Edelman's appeal, so I will say no more about that
 23 other than to say that QBE will adopt Mr Lockey's
 24 submissions made on behalf of Arch.
 25 My Lord, my appeal is concerned only with so-called

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1 disease clauses. QBE is an appellant in relation to
 2 a group of four policies referred to collectively in the
 3 judgment as QBE1. These policies have identical
 4 so-called disease clauses, save in one respect, to which
 5 I will refer later.
 6 I'm also responding to the FCA's appeal,
 7 Financial Conduct Authority's appeal, against the
 8 Divisional Court's construction in QBE's favour of two
 9 policy wordings referred to in the judgment as "QBE2 and
 10 QBE3" respectively.
 11 Now, before coming to the QBE1 wording, may I invite
 12 the court's attention to four paragraphs of the judgment
 13 of the court below, and the court will find the judgment
 14 in file C. For those paper documents, it's behind
 15 tab 3, and the first paragraph to which I would like to
 16 refer is at paragraph 81, that's at page 57 of the
 17 electronic file {C/3/57}. Paragraph 81 starts at the
 18 foot of the page and it says this:
 19 "It will be necessary to consider the terms of each
 20 of these policies separately as it is of course
 21 impossible to determine questions of policy coverage in
 22 the abstract. What these policies share, however are
 23 provisions which in broad terms provide coverage in
 24 respect of business interruption in consequence of or
 25 following or arising from the occurrence of a notifiable

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1 disease within a specified radius of the insured
 2 premises.”
 3 Then there follows a sentence which is not that easy
 4 to unpack:
 5 “In relation to each there arises the question of
 6 whether there is cover in respect of a pandemic where it
 7 cannot be said that the key matters which led to
 8 business interruption, and in particular the
 9 governmental measures, would not have happened even
 10 without the occurrence of COVID–19 within the specified
 11 radius as a result of its occurrence or feared
 12 occurrence elsewhere.”
 13 What we take that to mean is that it can’t be said
 14 that the loss–causing measures would not have happened
 15 had there been no occurrence of COVID–19 within the
 16 specified policy area, as those measures were taken as a
 17 result of the occurrence, or feared occurrence, of the
 18 disease elsewhere.
 19 Now, the next paragraph, is paragraph 100 and this
 20 is a paragraph with which my clients agree, where the
 21 court says, at page 66 {C/3/66}:
 22 “While much of the argument was understandably put
 23 in terms of the nature of the causal requirements, we
 24 consider that what underlies the dispute in relation to
 25 the causative requirements is a difference as to the

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1 nature of the peril insured and this depends upon
 2 a proper construction of the relevant terms of ...”
 3 Then it refers to the extension clause in another
 4 policy, the disease clause:
 5 “Once that question of construction is answered, it
 6 seems to us that the issues of causation will also
 7 largely have been answered and in particular it will
 8 have been established which matters can be said to be
 9 separate non–insured causes which could be seen as
 10 distinct from the insured peril.”
 11 My Lord, we respectfully agree with that. Once the
 12 insured peril is correctly identified, and that is
 13 purely a matter of policy construction, causation
 14 largely answers itself and once you have identified the
 15 insured peril, you know what it is that has to be
 16 removed or reversed out for the purpose of the
 17 hypothesis demanded by the policy disease trends
 18 clauses.
 19 The next paragraph is paragraph 110 at page 69
 20 {C/3/69}, where the court says:
 21 “If we are correct in our view as to the nature of
 22 the cover provided in the relevant disease clause, not
 23 mine, then the issues as to causation largely answer
 24 themselves. If properly construed there is cover for
 25 the effects of a disease which may occur both within and

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1 outside the specified radius and which may trigger
 2 response of the authorities and the public to the
 3 outbreak as a whole, and it would be inconsistent with
 4 the nature of the cover to regard the occurrence of the
 5 disease outside the radius or the response of to the
 6 authorities to that occurrence of disease as being
 7 alternative uncovered causes of the
 8 business interruption which could be relied on as
 9 supporting an argument that would have been the same
 10 business interruption in the absence of the
 11 insured peril.”
 12 In relation to the trends clauses, this is clearly
 13 set out at paragraph 532 at page 179 of the same file
 14 {C/3/179}.
 15 As I say, this is in relation to trends:
 16 “Similarly, in relation to the disease clauses we,
 17 have concluded that there is cover in principle — where
 18 we have concluded that there is cover in principle, we
 19 have done so because we considered on the correct
 20 construction of these wordings, they insure the effects
 21 of COVID–19 both within the particular radius and
 22 outside it. The whole of the disease, both inside and
 23 outside the relevant area, has to be stripped out in the
 24 counterfactual.”
 25 My Lords, there we are. The court concluded that

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1 the insured peril was the disease at large and the
 2 measures taken in respect to it.
 3 The last paragraph, before I turn to my wording, is
 4 paragraph 540 at page 180 of the file {C/3/180}. At
 5 paragraph 539, the court has addressed the types of
 6 proof which in principle will be available for
 7 demonstrating the existence of a case of COVID–19 within
 8 a relevant policy area at a given date. Then at 540,
 9 they say this:
 10 “The hearing proceeded accordingly and no expert
 11 evidence was heard on the question of prevalence. The
 12 court is therefore not in a position to make any
 13 findings of fact about the actual prevalence of the
 14 disease at particular dates or in particular locations.”
 15 My Lords, against that background, can I now turn to
 16 my policy wording which is also — this is QBE1 in
 17 file C, at page 715 and for those following in paper
 18 documents, that’s tab 12 {C/12/715}. If I can start at
 19 page 716, the contents page {C/12/716}, your Lordships
 20 will see that this policy is a composite policy which
 21 covers a miscellany of different risks and the sections
 22 to which I will turn are firstly the core section,
 23 section 4, which is the property section and after that,
 24 the section of central relevance, business interruption,
 25 which is section 7.

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1 Before coming to that, I should say that QBE insures
 2 policyholders that fall into six out of the seven
 3 categories helpfully identified by the court at
 4 paragraph 53 of its judgment. Perhaps we needn't come
 5 to this, but for your Lordship's note at file C,
 6 page 1951 and following, there's a very helpful schedule
 7 which tells you what category of clients is insured by
 8 any given policy under consideration.
 9 But all I'd like to say at this stage is that while
 10 QBE does cover many cases policyholders resident in
 11 London and major English cities, it also covers
 12 policyholders situated in other parts of the UK, some of
 13 them remote parts. For example, QBE has a number of
 14 policyholders in the Highlands of Scotland benefiting
 15 from disease clauses. It has nine in the Orkney
 16 Islands, it has one in the Isles of Scilly and it covers
 17 insureds in Northern Ireland in Armagh and Omagh and in
 18 some of the more remote parts of Wales as well as the
 19 major metropolises. I'll come back to the significance
 20 of that briefly and in due course.
 21 Now, if we go to page 724 of bundle C {C/12/724},
 22 the court will see the property section and this gives
 23 cover for physical damage to insured property and it's
 24 to be assessed -- the loss is to be assessed -- in the
 25 accordance with the basis of claim provisions and you'll

1 see that the cover works in relation to accidental
 2 damage to property insured.
 3 Now, "accidental" and "damage" are both defined
 4 terms. I'll give you the references to save going to
 5 them. The former, "accidental", is at page 804 and it
 6 means, not surprisingly, a single and unexpected event.
 7 The latter, "damage", means physical damage to tangible
 8 property and you'll find that definition at page 807
 9 {C/12/807}.
 10 You'll also see here reference here to territorial
 11 limits and the territorial limits for the property
 12 section, and indeed for the business interruption
 13 section, before we come to the relevant sub-limits, are
 14 the United Kingdom generally, and that you'll see at
 15 clause 23.110 at page 817 {C/12/817}. Unless the court
 16 feels it wants to look at those definitions, I won't
 17 spend time going to them.
 18 Accidental damage to the property insured is covered
 19 provided that:
 20 "Damage occurs during the period of insurance within
 21 the territorial limits and from a cause not excluded in
 22 the property-related exclusions."
 23 Now, against that background, can I come to
 24 section 7, which is the section we're centrally
 25 concerned with, at page 741 {C/12/741} which is the

1 business interruption section, and the court will see at
 2 7.1.1 that the core cover for business interruption is
 3 business interruption resulting directly from damage as
 4 defined to property. Damage has been defined as
 5 "physical damage to tangible property". Cover is
 6 provided to the resulting business interruption provided
 7 that, at the time the damage occurs, there's in force
 8 either cover under the property section of this policy
 9 or, and I am paraphrasing, a roughly equivalent property
 10 cover under a different policy. Then, at (b):
 11 "At the time the damage occurs you have claimed
 12 under the policy referred to in (a) above and the
 13 relevant insurer has either paid such claim or admitted
 14 liability or would have paid it but for the operation of
 15 some deductible or excess."
 16 Now, there then follows at 7.1.2 {C/12/741} basis of
 17 settlement provisions which your Lordships will see are
 18 applicable to the entire business interruption section,
 19 and we needn't, at least for my purposes, flog through
 20 these clauses. They are typical of this insurance.
 21 They quantify business interruption loss by reference to
 22 a number of defined parameters, the relevant ones of
 23 which are trend adjusted and the insured has a choice
 24 either to claim loss of insurable gross profit, which,
 25 in 7.1.2(a) means reduction:

1 "... in respect of reduction in turnover: the sum
 2 produced by applying the rate of gross profit to the
 3 amount by which the turnover during the indemnity period
 4 will, in consequence of the damage, fall short of the
 5 standard turnover ..." which is a trend adjusted defined
 6 term.
 7 Again at 7.1.4 {C/12/742}, your Lordships will see
 8 another option which is to claim reduction in gross
 9 revenue and again it works by reference to fairly
 10 similar formula, with standard gross revenue being
 11 a defined trend adjusted term.
 12 Then, although I don't want to spend time on it
 13 because I am adopting the submissions of others, for
 14 your Lordships' note, at page 817 {C/12/817} -- perhaps
 15 we ought to go there, actually. Sorry, it's 819
 16 {C/12/819}, my mistake. I apologise, you'll see the
 17 trend clause under the rubric "Trend adjusted", it's at
 18 23.117:
 19 "'Trend adjusted' means adjustments will be made to
 20 figures as may be necessary to provide for the trend of
 21 the business and for variations in or circumstances
 22 affecting the business either before or after the damage
 23 or which would have affected the business had the damage
 24 not occurred, so that the figures thus adjusted will
 25 represent as near as may be reasonably practicable the

1 results which but for the damage would have been
 2 obtained during the relative period after the damage.”
 3 Although that trends clause works by reference to
 4 damage as defined, which your Lordships know is physical
 5 damage, the court found — and it’s common ground before
 6 this court — that it applies across the board to
 7 business interruption caused by perils which are not
 8 physical damage. The necessary tweak, if I can put it
 9 like that, to the wording being to substitute the
 10 insured peril for the word “damage” when it appears.
 11 Can I now come to page 743 {C/12/743} of file C,
 12 where we see the extensions applicable to the
 13 business interruption section, one of which, 7.3.9, and
 14 I’ll come to that presently, is the disease clause which
 15 is central to my appeal. But the stem wording at 7.3
 16 says:
 17 “We will indemnify you for ...”
 18 I’ll come back to that. It may be relevant to an
 19 issue in due course.
 20 There are three clauses that I’d like to point up,
 21 if I may, en route to the disease clause. Each of these
 22 clauses has a specific geographical sub-limit which
 23 circumscribes the insured peril and limits the risk.
 24 The first is a denial of access clause at 7.3.4
 25 {C/12/44} which covers:

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1 “loss resulting from interruption of or interference
 2 with the business as covered by this section [and here
 3 are the words] caused by damage by any cause not
 4 excluded by this policy to property within ...
 5 250 metres of the perimeter of the premises which
 6 physically prevents or hinders the use of the premises
 7 or access thereto ...”
 8 What we say about that and similar clauses is that
 9 the specific limits on the territorial scope of the risk
 10 is intrinsic to definition of the insured peril. It’s
 11 only damage within that very narrow confine which is
 12 relevant when you come to ask whether that damage has
 13 caused the relevant interference with the business or
 14 led to the relevant restriction.
 15 The second immediately follows it, it is 7.3.5, it
 16 is “Denial of access non—damage”, and this covers:
 17 “Loss resulting from interference with the business
 18 caused by action by the police authority following
 19 danger or disturbance within 250 metres of the premises
 20 which shall prevent or hinder use of the premises or
 21 access thereto.”
 22 Now, a very similar form of wording, namely “danger
 23 or disturbance within the vicinity of the premises”, was
 24 the subject of a decision in the court below and may I,
 25 by analogy, show your Lordships where that is to be

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1 found. Paragraph 436, it’s a number of places, but
 2 paragraph 436 {C/3/155} of the judgment at 155 of this
 3 file and this is one of Amlin’s clauses. An AOCA is
 4 “action of competent authority” and you’ll see from the
 5 second line of that paragraph that what was in issue
 6 were the words:
 7 “ ... following a danger or disturbance in the
 8 vicinity of the premises.”
 9 I needn’t read out that paragraph, but the court
 10 found that that connoted incidence within a very narrow
 11 compass, in other words local to the premises, such as
 12 a bomb scare or a gas leak. And similar findings, for
 13 your Lordships’ notes, are to be found in relation to
 14 the same language, albeit in relation to different
 15 policies, at paragraph 466 {C/3/162} and 499 {C/3/169}.
 16 Just returning, if I may, to my clause, the
 17 inference from the wording used and, indeed, from the
 18 court below’s conclusion on similar wording, is that
 19 following danger or disturbance within 250 metres
 20 connotes incidence proximate or local to the premises
 21 and it must be such incidence that caused the relevant
 22 loss.
 23 The final such clause which operates by reference to
 24 its own specific geographical limits is 7.3.7 {HL/13/8}
 25 under the rubric “Loss of attraction”, that’s 7.4.4.

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1 The court will see that that covers:
 2 “Loss ... in consequence of diminution of attraction
 3 to the premises following damage by any cause not
 4 excluded by this policy to property occurring at any
 5 other site within a one ... mile radius of any of the
 6 premises ...”
 7 We say that in all three of those clauses the
 8 special geographical limits circumscribe the risk and
 9 are an intrinsic definition of the insured peril.
 10 My Lord, against that background, can I now focus on
 11 7.3.9, which is the disease clause under consideration
 12 in QBE’s appeal. I read back from the stem wording at
 13 7.3 that says:
 14 “We will indemnify you for interruption of or
 15 interference with the business arising from ...”
 16 There are then five perils of which (a) is the
 17 relevant one:
 18 “any human infectious or human contagious disease
 19 (excluding ... AIDS or an AIDS related condition), an
 20 outbreak of which the local authority has stipulated
 21 shall be notified to them manifested by any person
 22 whilst in the premises or within a 25 ... mile radius of
 23 it.
 24 “b) actual or suspected murder, suicide or sexual
 25 assault at the premises;

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1 "c) injury or illness sustained by any person
 2 arising from or traceable to foreign or injurious matter
 3 in food or drink provided in the premises;
 4 "d) vermin or pests in the premises;
 5 "e) the closing of the whole or part of the premises
 6 by order of a competent public authority consequent upon
 7 defect in the drains or other sanitary arrangements at
 8 the premises."

9 And then:
 10 "The insurance by this clause shall only apply for
 11 the period beginning with the occurrence of the loss and
 12 ending not later than three ... months thereafter during
 13 which the results of the business shall be affected in
 14 consequence of the damage."

15 My Lords, I make the following points in relation to
 16 that clause.

17 First, the stem wording, which you've seen at
 18 clause 7.3 {HL/13/7}, tells you this is not in terms
 19 an indemnity for loss resulting from
 20 business interruption, it is cover for
 21 business interruption arising from the perils described.
 22 That means that the perils described by the words that
 23 follow must be the proximate cause of the
 24 business interruption.

25 Now, the court may well be asking: why does it

1 matter whether business interruption is characterised as
 2 part of the peril or the loss which in turn is then
 3 quantified by the settlement provisions to which I've
 4 referred? To my clause I'm going to submit it doesn't
 5 matter at all for reasons I will explain, but the reason
 6 flows from the wording of section 55 of the
 7 Marine Insurance Act which, as the court will know, says
 8 that:

9 "Unless the policy otherwise provides, the insurer
 10 is liable for any loss proximately caused by a peril
 11 insured against but, subject as aforesaid, he is not
 12 liable for any loss which is not proximately caused by
 13 a peril insured against."

14 We needn't go to it, but the MIA is at {E/6/94} and
 15 what appears to have been suggested is that if
 16 business interruption is a component of a peril, then
 17 proximate cause only has to be established between the
 18 business interruption and the loss, as distinct from
 19 business interruption and the damage causing components
 20 of the peril.

21 That's, as I understand it, the potential relevance
 22 of the wording, but actually it doesn't matter for my
 23 clause, because my clause covers interruption or
 24 interference with the business arising from the peril
 25 which follows and it's not, I think, disputed that the

1 expression "arising from" connotes the relationship of
 2 proximate cause between that which immediately precedes
 3 it and that which follows.

4 I don't think the FCA disputes that this is the
 5 usual significance of the expression. For your
 6 Lordships' notes, at paragraph 362 of their respondents
 7 case, which can be found, we needn't go to it, at
 8 {B/10/443} and in any event, it's supported by
 9 authority, the most well known of which is *Coxe v*
 10 *Employers' Liability Insurance*, a judgment of
 11 Mr Justice Scrutton, which the court will find at file
 12 {F/19/314} for those that need it.

13 I will assume at the moment that it is common ground
 14 that the words "arising from" connote the nexus of
 15 proximate cause between the interruption of or
 16 interference with the business, in other words, the
 17 words that precede it, and the perils which immediately
 18 follow it. So that expression is a pointer to the
 19 proximate cause as regards each of those perils.

20 I should also say, for completeness, that in two of the
 21 four policies comprising QBE1, the words "caused by"
 22 replace "arising from". In my submission, they're
 23 synonymous. Those policies are at {C/22.1/1566} and
 24 {C/22.2/1643} respectively. We needn't go to them.

25 There then follows the description of the

1 insured peril and there are two clauses that refer back
 2 to the noun "disease" and these two clauses perform very
 3 different roles. The first is purely descriptive. It
 4 tells the reader what type of disease qualifies for
 5 cover, namely, when an outbreak of which the
 6 local authority has stipulated shall be notified to
 7 them. In effect, it's an internal definition of
 8 notifiable disease.

9 The second qualifying clause, however, performs
 10 a very different role. These are the words:
 11 "Manifested by any person whilst in the premises or
 12 within a 25-mile radius of it".

13 This clause tells you what has happened to the
 14 disease, how it must have behaved in order to disclose
 15 the insured contingency. It must have been manifested
 16 by any person whilst in the premises or within the
 17 a 25-mile radius of it. "Manifested by any person
 18 whilst in the premises," does not supplement the
 19 description of the disease. It doesn't add a qualifying
 20 characteristic to a disease. It tells you how the
 21 disease has acted. It describes a contingency in the
 22 nature of an event, and it is that event from which the
 23 business interruption must, as a matter of express
 24 wording, it is that contingency from which the
 25 business interruption must arise.

1 Now, the past participle of the word "to manifest"
 2 has been used by draftsman, but the same meaning could
 3 just as easily have been expressed by use of the present
 4 participle, i.e. a notifiable disease manifesting itself
 5 in any person, and although it doesn't concern me,
 6 your Lordships will see an example of that at
 7 paragraph 285 of the judgment {C/3/116}. It's one of
 8 RSA's policies, page 116, which covers loss as a result
 9 of paragraph 285:

10 "Closure or restrictions placed on the premises as
 11 a result of a notifiable human disease manifesting
 12 itself at the premises."

13 It doesn't matter which tense you use, but what that
 14 is describing is something in the nature of
 15 a contingency and it's the contingency from which, as
 16 a matter of express wording, the business interruption
 17 must arise.

18 Now, in some disease clauses, for example QBE2 and
 19 QBE3, to which we can come later, an occurrence of
 20 disease at the premises is covered separately from
 21 an occurrence within a radius of 25 miles of the
 22 premises. They are treated as separate perils. In
 23 fact, perhaps we had better look at an example of this
 24 so I can make the point. It's at page 97 of the C file
 25 {C/3/97} and you'll see in paragraph 208, that's QBE2,

21

1 which covers:
 2 "Loss resulting from interruption of or interference
 3 with the business in consequence of any of the following
 4 events ..."

5 And (a) is:
 6 "Any occurrence of a notifiable disease at the
 7 premises or attributable to food or drink supplied from
 8 the premises ..."

9 And (c) is:
 10 "any occurrence of a notifiable disease within
 11 a radius of 25 miles of the premises ..."

12 And there are other examples.
 13 Now, as I understand it, although this is not
 14 an observation made by the FCA in relation to QBE2 but
 15 similar clauses, the FCA seems to accept as regards
 16 other disease clauses that in the case of stand-alone
 17 cover for a notifiable disease occurring in the premises
 18 or attributable to food or drink supplied from the
 19 premises, an event at the premises has to be the cause
 20 of the loss. In other words, that must be the causative
 21 insured peril. For your Lordships' note, that's
 22 paragraph 194 of the respondent FCA's case at
 23 {B/10/394}.

24 Now, we submit that that is obviously correct, but
 25 we also submit that if it's right, there is no reason

22

1 why cover for an occurrence or manifestation of disease
 2 within 25 miles of the premises should not also
 3 circumscribe the insured peril from which the BI must
 4 arise. It's a different geographical limit, but it has
 5 the same role in circumscribing the territorial scope of
 6 cover. All that has happened in QBE1 is that the two
 7 separate perils have been elided for the purpose of
 8 constituting peril A.

9 My Lords, the next point is this. For a disease to
 10 become manifest, it has to have been demonstrated either
 11 by diagnosis or the showing of symptoms. An occurrence
 12 of a disease which is unobservable or asymptomatic
 13 cannot qualify. This is common ground and the court's
 14 finding on that is paragraph 225 of the judgment
 15 {C/3/102}. We needn't look at it, it's common ground.

16 Now, that's an important distinction because the
 17 manifestation of the disease by a person is an event in
 18 the sense in which that word is commonly used in
 19 an insurance context. That is to say, it is something
 20 observable which happens at a particular time, in
 21 a particular place, in a particular way, and is not too
 22 remote from the cause of loss.

23 It's to be distinguished in an insurance context
 24 from the remoter causes from that and other events may
 25 have originated and in making that distinction, we refer

23

1 in our written case — and I needn't traverse it here —
 2 to the familiar authorities cited at paragraph 74 to 77
 3 of QBE's appellants case, and that's at {B/8/277}.

4 So once the proximate cause, the relevant
 5 contingency, has been identified, you do not search for
 6 its remoter origins. The remoter originating cause
 7 of an insured contingency is irrelevant. The
 8 authorities in question are the well-known cases of
 9 Axa v Field, Becker Gray v London Assurance and
 10 Everett v London Assurance, and your Lordships will find
 11 them at those paragraphs.

12 Accordingly, we say, the event from which the
 13 business interruption must arise is the manifestation of
 14 the notifiable disease by someone whilst in the premises
 15 or within 25 miles of it. The area limited by the
 16 radius operates as a geographical sub-limit specific to
 17 this risk. It imposes an explicit limit on the scope of
 18 the insured peril. In this respect, the radius
 19 provision operates similarly to any other territorial
 20 limits imposed by a policy and your Lordships have heard
 21 that the prima facie limit for business interruption,
 22 territorial limit, is the UK.

23 Now, my Lord, that we respectfully submit, is the
 24 reading — the natural reading — of 7.3.9 simply taken
 25 on its own, but in its contractual setting, that

24

1 interpretation is emphasised, because — and I needn't
2 labour this — the court will see that perils (b), (c),
3 (d) and (e) are also perils, I should say, which refer
4 to events at the premises or attributable to something
5 happening at the premises, namely the provision of food
6 or drink.

7 My Lords, can I now deal with the wider matrix.
8 I've dealt with the clause in its contractual setting,
9 at least I hope I have, and I want to make four points
10 here because the wider matrix is something on which
11 great emphasis is placed by Mr Edelman's clients.

12 The first point is this, I apologise if they seem
13 obvious, but I submit they need to be emphasised in the
14 current context.

15 Firstly, it's only information reasonably available
16 to the parties at the time of contracting that is to be
17 attributed to their proxy, the notional reasonable man.
18 We say, for example, that it's reasonable to impute to
19 the broker and underwriters negotiating composite cover
20 of this sort the broad knowledge of public health powers
21 of which the average, well-informed citizen will be
22 generally aware. This would include, in serious cases,
23 a power to confine or quarantine infectious individuals,
24 or close perhaps specific premises, possibly even
25 a locality.

25

1 It's not, however, reasonable to impute to parties
2 negotiating composite cover of this sort the detailed
3 potential implications public health law outlined at
4 length in the FCA's respondent's case and most of us,
5 I would venture to submit, would have been unaware of
6 those powers before we came to look at this case. So
7 that's point 1.

8 Point 2, we submit, is important. In the vast
9 majority of instances of notifiable disease, the radius
10 clause would operate without undue difficulty to protect
11 an insured business. Before COVID-19 was listed as
12 a notifiable disease, 31 diseases were notifiable under
13 the relevant 2010 Public Health Protection Notification
14 Regulation, and I wonder if the court would like to look
15 at those. It's in file E, page 88 is the relevant list
16 of diseases, tab 5 for those who need it {E/5/88}.

17 What the court will see here — and there's quite
18 a long list — you will see cholera, food poisoning,
19 legionnaires' disease, measles, mumps, rubella, SARS —
20 and I'll come to that individually — tetanus and
21 typhus. You will see quite a few diseases which, if
22 they're manifest themselves, are likely to affect
23 a locality, maybe a wide locality, but that would likely
24 be their impact. For example, an outbreak of measles
25 may lead to closure of a school or college or —

26

1 MR EDELMAN: I'm sorry to interrupt, Mr Crane, but there was
2 a ruling by the court below, and of course Mr Crane
3 wasn't involved in the court below, about the incidence
4 of these diseases because there was a point being raised
5 on an Ecclesiastical policy and the court found against
6 the FCA's application to adduce evidence on the
7 potential spread of these diseases, so that was ruled
8 out.

9 MR CRANE: Sorry, I'm not quite sure where the direction of
10 that interruption goes, but it's taken a valuable minute
11 off my time, but perhaps I can go on.

12 I don't think anything in the court below —

13 LORD REED: Do carry on for the moment, Mr Crane, and then
14 we can hear Mr Edelman in reply if there is an objection
15 to this line of argument.

16 MR CRANE: Very well, my Lord. Can I just say, for example,
17 obviously Legionnaires disease might lead to the closure
18 of one or more group of premises, but I will leave it
19 there.

20 The converse of this point is that the fact that
21 there are difficulties in applying this clause to the
22 wholly unforeseeable circumstances of this case does not
23 mean that the cover is illusory, a word that you will
24 come across frequently in the respondents' submissions.

25 A year ago, it was utterly inconceivable that the UK

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1 and devolved governments will close down almost the
2 entire national economy and confine healthy citizens to
3 their homes to prevent further transmission of
4 a disease.

5 It was inconceivable that such measures would be
6 taken indiscriminately in the sense of nationally
7 throughout the UK, irrespective of the prevalence of
8 disease in any given locality.

9 Now, point 3 is that it's not suggested by QBE that
10 an epidemic as such was unforeseeable, as distinct from
11 the extraordinary measures taken in response in this
12 case to the pandemic. As the FCA has pointed out, SARS
13 was one of the notifiable diseases and a disease such as
14 SARS might well have had unpredictable patterns of
15 transmission and become widespread.

16 A number of points flow from that. First, it's
17 a fallacy to assume from the fact that a particular risk
18 may have been foreseen as a possibility at the time of
19 contract that the parties agreed to cover it, or, more
20 relevantly, to cover it without relevant limits. The
21 fact that a contingency may have been foreseeable does
22 not mean that the underwriter agreed to cover that
23 contingency without limits or that the policyholder was
24 willing to pay for such cover.

25 The question whether a given contingency is covered

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1 is answered not by asking whether it was reasonably
2 foreseeable to the parties, but by a reading of the
3 insurance clause.

4 Now, the proper inference, the next point, is that
5 the proper inference here is that in the face of the
6 risk of a disease occurring with unpredictable patterns
7 of spread, there was no agreement to insure the effects
8 of such a disease at large. On the contrary, we submit,
9 in the face of such a risk, the parties stipulated for
10 a radius clause. That is to say, for an agreement to
11 cover the impact on an insured business of any such
12 disease manifesting itself within a territorially
13 limited area.

14 Point four that I would like to make on the wider
15 matrix is this: Where circumstances have occurred which
16 were inconceivable when contracting, as I say, it's not
17 the epidemic as such, it's the measures in response, it
18 is tempting to interpret a contract with hindsight so as
19 to make it fit what may seem to be the merits as they
20 now appear.

21 Now, I hope the court will forgive me if I refer in
22 this context to a well-known dictum of
23 Sir Thomas Bingham when he was Master of the Rolls in
24 the case of *Philips Electronique v BSKyB*, which the
25 court will find in file G at page 1556, tab 77 for those

29

1 that need it {G/77/1556}. Now, this, I should make it
2 clear, was a case about the implication of implied terms
3 and the court, I'm sure, will be familiar with it. One has
4 to treat the observation to which I'm going to refer in
5 that context. It is found at page 1556 and it's just
6 after the first paragraph break where the Master of the
7 Rolls said this:

8 "The question of whether a term should be implied
9 and if so what, almost inevitably arises after a crisis
10 has been reached in the performance of the contract. So
11 the court comes to the task of implication with the
12 benefit of hindsight and it's tempting for the court
13 then to fashion a term which will reflect the merits of
14 the situation as they then appear. Tempting but wrong."

15 Now, your Lordships will see on the previous page,
16 155, central paragraph, the context for this, which is
17 that the process of implying a term is rather more
18 ambitious than construing a contract, and I want the
19 court to have that context.

20 It remains relevant because here we're facing the
21 same temptation, we're construing a clause with
22 hindsight in the aftermath or indeed during a crisis of
23 unprecedented proportions and there is always
24 a temptation to read it in a way which makes it
25 accommodate the unprecedented facts as they occur. But

30

1 I have to respectfully submit that that is a wrong
2 approach.

3 My Lords, on radius clauses, before I leave them,
4 the court will have had the core of my submissions when
5 I was going through my clause, but can I just make five
6 points in relation to radius clauses before I leave
7 them.

8 The first this, there's no reason why a radius
9 clause should be treated any differently from any
10 other geographical limit on the risk. The scope of
11 insurance cover, we submit, is habitually circumscribed
12 by vertical and horizontal limits and where geographical
13 limits are placed on a risk, the inevitable inference is
14 that instances of the risk occurring outside the
15 geographical area are not covered.

16 That's point 1.

17 For example, one can illustrate this under the
18 property material damage section of this policy where
19 the territorial limits are the United Kingdom. That
20 section of the policy would not respond to property
21 damage caused outside the United Kingdom. That would
22 seem obvious, but we say it's just as obvious when you
23 have a sub-limit in the shape of a radius clause.

24 The second point is this, geographical limits are
25 simply one method by which insurers limit the potential

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1 for accumulation of loss across their book of business.
2 It's a crude tool, but it is, nevertheless, there for
3 that reason.

4 The third is this. There is no logic, we submit, in
5 the proposition that because the area within the
6 specified circumference is extensive, it is to be
7 inferred that the parties intended to cover the impact
8 of cases outside that area. The fact that the
9 territorial limits on a risk are generously drawn, in
10 fact the relevant area is nearly 2,000 square miles
11 within a radius of 25 miles from a fixed point, the fact
12 that those limits are generously drawn does not mean
13 they can be disregarded. Thus, a one-mile, a five-mile
14 or a ten-mile radius would reduce the underwriters'
15 exposure, but its effect in circumscribing the risk
16 would, in principle, be the same.

17 The next point is important from QBE's point of
18 view. It's a fallacy to view their case as contending
19 for an exclusion of cover if notifiable disease is
20 manifested outside the specified area.

21 Such instances are merely not covered and in each
22 case the question is whether the manifestation of
23 disease within the specified area is a proximate cause
24 of the business interference. I need no help in
25 "but for" causation, in my submission, I should say

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1 that.
 2 Take a case, the fifth point, where
 3 a notifiable disease manifests itself both inside
 4 a specified area and outside it. In such a case,
 5 a judgment has to be made as to whether the appearance
 6 or manifestation of a disease within the perimeter was
 7 the efficient or dominant cause of loss. This is
 8 a question of fact in each case. If, for example, there
 9 is a cluster of cases within the radius but relatively
 10 few outside, the inference might well be drawn that
 11 measures taken in response were in response to disease
 12 within the insured area.
 13 Lord Leggatt.
 14 LORD LEGGATT: You said the efficient or dominant cause of
 15 loss, Mr Crane. I just wanted to pick you up on that.
 16 MR CRANE: Yes.
 17 LORD LEGGATT: It is well established nowadays, isn't it,
 18 that there can be multiple causes of loss; we're not
 19 limit to finding the dominant cause?
 20 MR CRANE: That's correct, my Lord. Well, I'm going to deal
 21 with that in a second, but I'm going to come back to it
 22 in relation to the court's view on causation.
 23 In a case where there is disease manifested both
 24 inside and outside the relevant area, one has to ask --
 25 has to make a judgment as to whether the causes, or the

1 manifestation of the disease, within the relevant
 2 perimeter were the effective cause of loss in the sense
 3 that the business interruption arose from those cases.
 4 Now --
 5 LORD LEGGATT: Well, was there an effective cause of loss,
 6 then?
 7 MR CRANE: Yes, indeed, an effective cause of loss.
 8 LORD LEGGATT: Even if the occurrence outside the zone was
 9 another effective cause of loss?
 10 MR CRANE: Yes, yes, I accept that, but we'll see on the
 11 facts of this case that the relevant measures -- there's
 12 no evidence that the relevant measures, the government
 13 measures, which caused the business interruption, either
 14 from 16 March or 23 March or the 26th were measures in
 15 response to the manifestation of disease at any given
 16 locality.
 17 One has to ask in cases where there is disease both
 18 within and without the relevant insured perimeter what
 19 are the respective contributions of those cases to the
 20 business interruption of the insured premises in
 21 question.
 22 So I accept, indeed it is part of my submission,
 23 that when cases occur both inside and outside the
 24 relevant perimeter, it will be necessary to assess the
 25 respective efficiency as a cause of loss of the covered

1 and non-covered causes.
 2 Now, can I now turn to the Divisional Court's
 3 construction. The Divisional Court opted for
 4 a construction that removed any causative relevance from
 5 a manifestation of disease within the specified area.
 6 That's my core complaint, respectfully made.
 7 It concluded that the insured peril was the
 8 notifiable disease at large and that cover under the
 9 QBE1 disease clause was triggered if and when there was
 10 a single manifestation of disease within the defined
 11 area. This interpretation is most starkly illustrated
 12 by the Divisional Court's declaration in relation to QBE
 13 which the court will find at page 20 of file C, behind
 14 tab 1 for those that need it {C/1/20}.
 15 24.3 is the relevant declaration and it says this:
 16 "If COVID-19 was manifested at or within a 25-mile
 17 radius of the insured business, as to which see
 18 declaration 7 [which, by the way, just tells us the
 19 meaning of 'manifested'] there would be cover under the
 20 disease clause in QBE1 from the date COVID-19 was
 21 manifested in a 25-mile radius, the losses caused by
 22 interruption of or interference with the insured
 23 businesses caused by COVID."
 24 Then it refers to various measures pleaded by the
 25 Financial Conduct Authority. Then, under (i), and this

1 is important:
 2 "It is not necessary for the interruption of or
 3 interference with the insured business to have been
 4 caused by the manifestation of COVID-19 within the
 5 25-mile radius as distinct from its manifestation
 6 outside the radius ..."
 7 And (ii):
 8 "The correct counterfactual is as set out in
 9 declaration 11."
 10 Thus, for the court's note, that deals with the
 11 trends clause and, of course, once you've identified the
 12 insured peril as a disease generally and measures taken
 13 generally with regard to it, you extract that in
 14 constructing the hypothesis required by the trends
 15 clause.
 16 This means, and I will just take -- this is pure
 17 hypothesis, this means, for example, that in remote
 18 areas of the United Kingdom, such as, for example, the
 19 Highlands, the Orkneys, remoter parts of Northern
 20 Ireland or the Isles of Scilly, is an example that's
 21 been taken before, it's immaterial in such areas whether
 22 the lockdown and the consequent interference with local
 23 businesses preceded the first recorded case of COVID-19
 24 or not. On the court's construction, it simply doesn't
 25 matter whether the first local manifestation precedes or

1 follows the measures that caused the damage.
 2 Where the first local case follows, the fiction —
 3 and this is advanced by the FCA in their respondent's
 4 case — is that somehow that local case operates as
 5 a concurrent cause of the continuing loss to which we
 6 say that cannot be correct. It's a fiction. The cause
 7 of loss is government measures which, on this
 8 hypothesis, have already had and continue to have their
 9 impact.
 10 In short, what on a natural reading, in my
 11 submission, is the insured event becomes, on the court's
 12 interpretation, a mere proviso to cover. The radius
 13 provision becomes a tick-box covering sets when someone
 14 with symptoms strays into the specified area presumably
 15 with the insured being oblivious to that fact and for
 16 the fact that its loss has now become recoverable and
 17 the indemnity period, which dates from the date of loss,
 18 has now incepted.
 19 Now, my Lords, against that reasoning, can I come to
 20 the one paragraph in the judgment in which the court
 21 deals with this clause or with its interpretation.
 22 That's paragraph 226 {C/3/102} at page 102. For the
 23 court's note you'll see in 224 there is a conclusion on
 24 the meaning of "manifested" with which we respectfully
 25 agree and at 226 we have the court's reasoning:

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1 "Focusing on the language and structure of 739, we
 2 consider that within the insured peril the required
 3 causal link arising from is between the interruption or
 4 interference with the business on the one hand and the
 5 notifiable disease on the other, provided has been
 6 manifested by a person within the 25-mile radius. We do
 7 not consider that the clause most naturally reads or
 8 should be construed as saying that the interference has
 9 to result from the particular cases in which the disease
 10 has manifested within the 25-mile radius. Instead, the
 11 cover is for the effects of a notifiable disease if it
 12 has been manifested within the 25-mile radius. This
 13 appears to us to be apparent from the juxtaposition of
 14 the phrase 'relating to business interruption' without
 15 relating to notifiable disease and the fact that the
 16 phrase 'manifested by any person whilst in the premises
 17 or within a 25-mile radius of it' is most naturally read
 18 as an adjectival clause limiting the class of notifiable
 19 disease which, if they interfere with the business, will
 20 lead to coverage."
 21 Now, my Lords, in my respectful submission, there
 22 are three errors in this paragraph.
 23 The first is that the required causal link "arising
 24 from" is not within the insured peril. It's between the
 25 business interruption and the insured peril that

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1 follows.
 2 Your Lordship has had, I hope, a brief but helpful
 3 explanation earlier as to why that might matter because
 4 causal relationships within the insured peril don't have
 5 to observe the discipline of proximate cause required by
 6 section 55 of the Marine Insurance Act as regards the
 7 relationship of the peril to the loss.
 8 In my case, while we say that's an error, it's
 9 an error that matters for reasons I've already
 10 explained, namely that it's common ground that the words
 11 "arising from" usually connote proximate cause, the
 12 nexus of proximate cause, and that is the only nexus
 13 apparent between the business interruption and the
 14 various perils that follow. So it doesn't make any
 15 difference.
 16 However, the other two errors, in my respectful
 17 submission, do. The second is the court says that the
 18 reading that you have just heard is the most natural
 19 reading. In other words, the reading which I have
 20 offered to the court is not the most natural reading.
 21 Now, I would respectfully submit that one can test
 22 that by asking this rhetorical question: if any of us
 23 had read this clause a year ago and been asked what it
 24 meant and what it covered, in my respectful submission,
 25 the result would have been obvious. It's quite clear

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1 that this clause intended to cover the effects of
 2 a notifiable disease manifesting itself within the
 3 premises or the specified area.
 4 The third error, in my submission, is the court's
 5 treatment of the relative clause "manifested by any
 6 person within the premises or within a 25-mile radius of
 7 it". This clause is not a supplement for the
 8 description of the disease. That's already been
 9 described. It's a clause which tells you albeit
 10 succinctly what the disease has done, what has happened
 11 to it. In other words, it describes a contingency and
 12 it's that contingency which, when one refers back, has
 13 to be the cause of the business interruption or loss.
 14 It's easy to say it's adjectival because ultimately
 15 it conditions a noun, but actually it's doing a job
 16 completely different from the clause.
 17 My Lords, that's my case on construction. Can
 18 I just invite the court to see where the court goes on
 19 causation and we find that at page 69 of file C,
 20 paragraph 111 {C/3/69}. I think we've been there
 21 already.
 22 UNIDENTIFIED SPEAKER: No, we haven't.
 23 MR CRANE: Yes, paragraph 111, we can pick it up, I think,
 24 halfway down that paragraph. The first part of the
 25 paragraph is dealing with the meaning of the word

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1 "following", but the court says this, halfway down 111:
 2 "Even if the word 'following' imports the
 3 requirement of proximate cause, we would consider that,
 4 given the nature of the cover as we consider it to be,
 5 this is to be regarded as satisfied in a case in which
 6 there is a national response to the widespread outbreak
 7 of a disease. In such a case, we consider that the
 8 right way to analyse the matter is that the proximate
 9 cause of the business interruption is the
 10 notifiable disease of which the individual outbreaks
 11 form indivisible parts."

12 So that is once you have identified the disease at
 13 large as the peril, it follows that anything caused by
 14 the peril at large, provided it proximately affects the
 15 business interruption, is recoverable and, by parity of
 16 reasoning, it is removed for the purpose of performing
 17 the hypothesis or constructing the hypothesis required
 18 by the trends clause, and we should pick up in 112 the
 19 alternative view of causation which the court regards as
 20 less satisfactory and this really is relevant to
 21 Lord Leggatt's question:

22 "Each of the individual occurrences was a separate
 23 but effective cause and on this analysis they were all
 24 equally affected because the authorities acted on
 25 a national level."

1 Now, I needn't say any more about the court's
 2 preferred view of causation because it's completely
 3 contingent on who's right as to construction, but if I'm
 4 right on construction, there is no problem as to
 5 causation and we can see that in the way the court dealt
 6 with QBE2 and 3 at paragraph 235, page 104 {C/3/104} and
 7 the background is the court found for QBE on this
 8 wording. They said:

9 "Given our construction of 3.2.4, the issues as to
 10 causation largely answer themselves."

11 Now, I needn't read that paragraph because the court
 12 goes on to say how causation works on that hypothesis.

13 Yes, Lord Hamblen.

14 LORD HAMBLEN: Why is that, Mr Crane? If paragraph 112 is
 15 right, if each local occurrence is an effective cause of
 16 the national measures taken, why isn't the local
 17 occurrence any proximate cause?

18 MR CRANE: Because, my Lord, in relation to 3.2.4 the court
 19 has found that the peril is the event constituted by the
 20 occurrence of disease within the relevant radius. Ergo,
 21 on that hypothesis that that construction is right, it
 22 follows that those occurrences have to be proven to be
 23 the cause of the relevant business interruption and
 24 elsewhere it's become, in my submission, plain that no
 25 cluster or single case of a local occurrence was the

1 cause of the measures which affected businesses
 2 throughout the United Kingdom.

3 LORD HAMBLEN: But if it was a cause, as paragraph 1125, why
 4 isn't that good enough?

5 MR CRANE: Well, my Lord, for this reason: paragraph 112
 6 proceeds and the court regards it as less satisfactory
 7 on the basis that each case of illness is a separate
 8 occurrence and given that that is the case -- and we're
 9 not talking about interdependent clauses here, we're
 10 talking about independent separate clauses -- what has
 11 to be demonstrated on that hypothesis is that the
 12 independent cases of illness manifested or occurring
 13 within a given radius led to or caused the
 14 business interruption in question.

15 On that basis, one is into cases such as
 16 The Miss Jay Jay and Wayne Tank and Pump, which concern
 17 interdependent clauses, which these are not, but which
 18 are authority for the proposition which again has been
 19 accepted by the Financial Conduct Authority that where
 20 you have non-covered causes and covered causes, we, the
 21 insured, can recover if the covered and non-covered
 22 clauses are roughly of equal efficiency. That's
 23 accepted as the result of those authorities by the FCA.
 24 I'll give you the paragraph in their case. It's
 25 paragraph 347 and it's at tab 10 of bundle B, at 439

1 {B/10/439}:

2 "The insured will only recover if the insured and
 3 non-insured perils are of roughly equal efficiency as
 4 a cause of loss."

5 That's what's accepted by the FCA, in my submission
 6 correctly.

7 Now, on the hypothesis of this -- on the assumption
 8 of this alternative view of causation where each
 9 individual case is an independent cause, one has to ask
 10 whether the combined effect of those causes within the
 11 relevant area is a roughly equal efficiency as a cause
 12 of loss as the effect of cases outside the area
 13 nationally, which prompted the relevant measures.

14 The question becomes: were the individual cases
 15 within any insured area the efficient or proximate cause
 16 of the loss?

17 My Lord, that's an hour and ten minutes, including
 18 one minute that Mr Edelman borrowed from me. Unless
 19 your Lordships have any questions with which I can help
 20 at this stage, I would give way to the next insurer.

21 LORD REED: Well, thank you very much, Mr Crane.

22 I believe we turn next to Mr Simon Salzedo QC on
 23 behalf of Argenta.

24 Submissions by MR SALZEDO

25 MR SALZEDO: Thank you very much, my Lord. If it's

1 convenient to your Lordships, I will first introduce the
 2 Argenta1 wording, then make first submissions on each of
 3 my six grounds of appeal in order. As your Lordships
 4 know, time is very short for the oral argument, so it
 5 is not a mere formality when I say that I also adopt my
 6 written case, I adopt the submissions of Mr Crane in
 7 relation to disease clauses general, and that includes
 8 his adoption of the submissions of other insurers on
 9 certain aspects.

10 My Lords, the Argenta wording is at {C/5/259} and if
 11 we turn to page 261 {C/5/261} you can see the contents
 12 page and like Mr Crane's composite QBE1, this also
 13 could be called a composite insurance. The main
 14 sections are buildings insurance, the fourth line of the
 15 contents, and contents insurance. There are then
 16 numerous added extras to those property classes,
 17 including business interruption insurance section
 18 starting at page 55, and in our bundle that's {C/5/314}.

19 As you can see at the top of the page, 314, the
 20 business interruption section is operative only if the
 21 contents section is operative. So it never stands
 22 alone.

23 On the next page, 315 {C/5/315} the main
 24 business interruption insurance section:

25 "If business at the premises is interrupted as

1 result of the premises being made uninhabitable by any
 2 Damage insurable under business or contents section,
 3 Argenta will indemnify the insured for the amount of
 4 loss stated in basis of settlement up to the limits of
 5 liability ."

6 Notice, my Lords, that the phrase
 7 "business interruption" does not feature in the main BI
 8 insuring clause at all other than in the heading. The
 9 closest thing in the text is the word "interrupted",
 10 which is not a defined term.

11 What, then, is the structure of the main BI clause?
 12 I submit the structure is this: the subject matter of
 13 the insurance is the Business of the Premises. That is
 14 the thing that may get damaged by a peril. It's the
 15 equivalent of the property or the contents insured under
 16 the main section.

17 The policyholder's insurable interest in that
 18 subject matter is their entitlement to profits from the
 19 Business at the Premises. The type of damage to that
 20 subject matter, which this insurance covers, is being
 21 interrupted. It's the Business being interrupted which
 22 is the equivalent of property being lost or damaged.
 23 The peril which is insured against is the premises being
 24 made uninhabitable by Damage insurable under the
 25 buildings or contents section. That's the fortuity that

1 might cause damage to the business in the form of
 2 interruption .

3 As you would expect, the clause specifies a causal
 4 link between peril and damage with the words "as
 5 a result of". The measure of indemnity for interruption
 6 damage is defined in the basis of settlement clause. If
 7 we look now at the basis of settlement clause at page
 8 {C/5/318} again we find that "interruption" and
 9 "interrupted" are not mentioned in this clause at all
 10 other than in the heading.

11 The principal measure of indemnified loss in (a) of
 12 this clause is the amount by which gross income is
 13 reduced due to the Damage and that confirms that the
 14 sense of the peril is Damage. The words "due to"
 15 express the causal link directly from peril to loss. We
 16 don't need to look, I think, at the other two.

17 Similarly , my Lords, if you go to page {C/5/314},
 18 turning back a couple of pages, and see the definition
 19 of "indemnity period", again "interruption" is not
 20 mentioned and the indemnity period makes sense only on
 21 the basis that Damage is the insured peril.

22 On the same page, you find the definition of
 23 "standard gross income", which is the Argenta trends
 24 clause, and it also makes no reference to interruption
 25 and it also treats Damage as the peril which causes the

1 reduction in gross income.

2 My Lords, the extensions to the BI cover are at
 3 page {C/5/316}. The heading at 316 is:
 4 "Business interruption insurance section extensions".
 5 So this is expressly stated to be a set of extensions to
 6 the main cover which I have just shown you.

7 You can see the extended insuring clause in the top
 8 left box on 316, and:

9 "The company will also indemnify the insured as
 10 provided in the insurance of this section for such
 11 interruption as a result of ..."

12 Then the list of extended perils.

13 The word "also" further confirms that this must be
 14 read with the main BI section as an extension of it and
 15 so do the words "as provided in the insurance of this
 16 section". The term "such interruption" is a reference
 17 back to the main BI insuring clause and it means
 18 interruption of the business at the premises.

19 Again, though, the word "interruption" is not here
 20 a defined or technical term.

21 The phrase "indemnify for such interruption"
 22 confirms that, as we've seen in the main BI clause, such
 23 interruption is the type of damage for which the
 24 insurance provides indemnity.

25 The words "as a result of", at the end of the

1 insuring clause, are causal words. So one would expect
 2 that what follows that phrase will be the insured perils
 3 under the extension. As expected, what follows is
 4 a list of perils, whose role in the extension section is
 5 identical to the role in the main BI section of Damage.
 6 It's common ground among Argenta, the FCA and the
 7 Divisional Court judgment that for the purposes of the
 8 extensions in the definitions that I've shown you of
 9 "basis of settlement" and "standard gross income", where
 10 the word "Damage" appears, it means the relevant peril
 11 insured, including under the extensions where they are
 12 not damage. I add, my Lords, that the same must be true
 13 of the indemnity period definition.
 14 It follows, from simply reading the policy with its
 15 proper structure, that the only way to make sense of the
 16 wording is the analysis that I have been setting out as
 17 I've read it, namely that in the main BI section the
 18 peril insured is Damage, which makes the premises
 19 uninhabitable, and then the extensions, the peril is the
 20 content of each of the boxes on the left-hand side on
 21 {C/5/316} and {C/5/317}.

22 My Lords, looking at those boxes now in slightly
 23 more detail, you can see that each is closely focused on
 24 the Premises, each in its own different way. So in box
 25 one, we have:

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1 "Damage to property in the vicinity which prevents
 2 or hinders use or access to the premises."
 3 Box two is:
 4 "Damage to utilities supplying the insured.
 5 Since the damage has to interrupt the business at
 6 the premises, in practice that means damage to a utility
 7 that supplies the insured's Premises."
 8 Box 3 is similar in relation to other suppliers.
 9 Box 4, going on to page {C/5/317} covers five
 10 sub-paragraph perils:
 11 "(a) restriction on the use of the premises by order
 12 of public authority consequent upon certain matters, all
 13 of which have to occur at the premises.
 14 "(b) any occurrence of [note that phrase]
 15 a notifiable disease at the premises or attributable to
 16 food and drink supplied from the premises.
 17 "(c) a discovery of an organism at the premises."
 18 I'll come back to (d), which is the important one,
 19 in a moment:
 20 "(e) any occurrence of [that phrase again] murder or
 21 suicide at the premises."
 22 5, I'll also come back to in a moment.
 23 Then 6:
 24 "Damage to property in the vicinity which deters
 25 potential customers."

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1 Then just going back, we have the two provisions
 2 which have a 25-mile radius requirement. Extension 5
 3 is:
 4 "Pollution or an oil spill within 25 miles."
 5 Note that the maximum indemnity for that one is
 6 a mere £2,500.
 7 4(d) is:
 8 "Any occurrence of notifiable human disease within
 9 25 miles of the premises with a limit of £25,000."
 10 Now, my Lords, every single one of these extended
 11 perils will have some underlying cause which could
 12 itself be the cause of additional loss to the
 13 policyholder. Looking at each type of peril broadly,
 14 first, we've got damage to property. Well, that could
 15 easily form part of a wider issue. There might be
 16 a major flood or a severe weather event.
 17 Secondly, vermin and pests, they never come single
 18 spies. I won't quite submit, my Lords, that in London
 19 you are never more than 6 feet from a rat, but if you do
 20 see a rat or a mouse or a cockroach you can be pretty
 21 sure that you are not far from many, many more of them,
 22 some of which may be at the premises, some of which may
 23 not be, and there may be a common cause to any given
 24 infestation.
 25 Diseases, similarly occur in outbreaks, as the FCA

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1 emphasises many times in its case. Even a murder at the
 2 premises could be part of a campaign of terrorism which
 3 could lead to action by the authorities leading to
 4 business interruption, and oil spills have been known to
 5 pollute not just 25 miles area, but thousands of miles
 6 of coastline length in the worst cases.
 7 My Lords, we accept that essential facts of nature
 8 of that kind may be taken to be known by the parties and
 9 with that knowledge, the parties to this contract agreed
 10 to draw particular lines on the causal chains that might
 11 lead from those underlying causes to loss and the lines
 12 are the ones set out in the boxes on page 316 and 317
 13 {C/5/316} and {C/5/317}.

14 Indeed, one could say that that's fundamentally what
 15 insured perils are. They're the agreed stopping points
 16 on the legal causal chain that must be traced through
 17 the complex net of factual issues and factual causes.
 18 In any insurance, the insured will normally benefit from
 19 drawing that line further back from the loss so as to
 20 have more available routes of recovery. The insurer
 21 will benefit from drawing that line closer to the loss
 22 so that there are less available routes factually of
 23 recovery. That is one of the key matters that any
 24 insurance wording will resolve and of course it may well
 25 have an impact on the price of the cover because it's

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1 a key matter going to the risk .
 2 One further part of the wording to notice on page
 3 {C/5/317} in the right-hand box contains the exception
 4 exclusions to box number 4 and section exclusion (iii)
 5 is:
 6 "For any loss arising from those premises that are
 7 not directly affected by the occurrence, discovery or
 8 accident."
 9 What I draw attention to in that exclusion is the
 10 phrase "the occurrence, discovery or accident" which
 11 words are strongly redolent of specific and discrete
 12 events of the sort listed in box 4.
 13 My Lords, just stopping to take the words literally
 14 at this stage, what extension of 4(d) actually says is
 15 that there is an indemnity for interruption to the
 16 business at the premises as a result of any occurrence
 17 of a notifiable disease within 25 miles of the premises.
 18 This is, therefore, cover for damage, the form of which
 19 is interruption to the Business at the Premises, only
 20 when caused by the peril or fortuity of any occurrence
 21 of a notifiable disease within 25 miles of the premises.
 22 That's what it actually says.
 23 My Lords, the bulk of the business interruption
 24 losses with which this case is concerned were
 25 immediately caused by government or public responses to

1 COVID-19. The underlying cause was the pandemic itself.
 2 As Mr Crane showed you, the judgment at paragraph 81,
 3 which if you want to look at it again is {C/3/57} points
 4 out that the question that arises on disease clauses is
 5 whether there is cover in respect of a pandemic where it
 6 cannot be said that the key matters which led to
 7 business interruption, and in particular the
 8 governmental measures, would not have happened even
 9 without the occurrence of COVID-19 within the specified
 10 radius.
 11 That is the question. There is some attempts by the
 12 FCA perhaps to suggest differently on this appeal, but,
 13 my Lords, if an individual insured can prove that their
 14 losses were caused by occurrences within the radius,
 15 then Argenta has never denied cover. That's never been
 16 part of the dispute between Argenta and its
 17 policyholders. This test case concerns whether or not
 18 that is one of the things that has to be proved. The
 19 effect of the judgment is that that is one of the things
 20 that does not have to be proved.
 21 The central on Argenta's appeal is whether there is
 22 cover under extension 4(d) in a case where the
 23 insured peril, as defined in section 4(d), does not
 24 feature on the causal chain leading to the relevant
 25 losses, and Argenta submits that once one reads the

1 policy and identifies the question, with all respect to
 2 the court below, it is obvious that there can be no such
 3 cover.
 4 My Lords, my six grounds.
 5 Ground 1 is the identification of the peril and what
 6 counts as damage and loss, and I obviously in a sense
 7 made submissions about this as I've shown you the
 8 policy.
 9 Ground 1 is that the court below was wrong to
 10 identify the relevant peril in Argenta1 as being
 11 a composite of business interruption at the premises as
 12 a result of extension 4(d). That's to say bringing
 13 business interruption into the peril itself .
 14 At the trial, the precise identification of the
 15 peril in Argenta1 as being any occurrence of
 16 a notifiable disease within 25 miles of the premises was
 17 common ground. Argenta pointed that out in writing and
 18 orally and was never questioned or contradicted on it.
 19 The court overrode that common ground without
 20 acknowledgement or explanation. Even on this appeal, my
 21 Lords, it remains common ground that the words "as
 22 a result of" denote proximate causation in Argenta1 and
 23 I'll come back to show you that shortly.
 24 On our view of the peril, those words at page
 25 {C/5/316} appear between the peril and the damage, which

1 is exactly what you would expect. But on the
 2 Divisional Court's analysis and the FCA case, they are
 3 an anomaly. Our analysis is also consistent with the
 4 fact that the wording does not state any causal
 5 connection between such interruption and loss.
 6 My Lords, the FCA notes this point in its
 7 respondent's written case at {B/10/403}. If I could
 8 just ask your Lordships to look at that, at
 9 paragraph 224.2. At 224.2, your Lordships see the FCA
 10 write:
 11 "Argenta unusually does not include a provision
 12 indemnifying for loss resulting from the interruption .
 13 It does not specify a causal link between loss and
 14 interruption at all, it just provides an indemnity for
 15 the interruption. This most likely imports the default
 16 proximate cause test between loss and the interruption."
 17 So the FCA is driven to argue that the lack of any
 18 causal link most likely imports proximate cause. In our
 19 submission, that involves strain and artificiality. The
 20 natural construction of the words used at {C/5/316} is
 21 that the indemnity is for the damage which is
 22 constituted by such interruption of the Business. That
 23 construction does not invoke causation at all, which is
 24 consistent with the absence of causal wording between
 25 those two matters.

1 I also refer my Lords on this point to our written
 2 case at {B/5/124} at paragraphs 27 to 28 where
 3 your Lordships may recall that we have referred to some
 4 authorities showing the way that "peril" has always been
 5 understood in insurance law, including of course
 6 section 55, which Mr Crane has already read to my Lords
 7 and we spell out at paragraph 28 the analogy between
 8 other forms of more basic insurance, if you like, and
 9 business interruption cover.

10 My Lords, what we say about this is also entirely
 11 consistent with the history of business interruption
 12 cover which the FCA has set out in its written case at
 13 {B/10/361}. Your Lordships may recall that at
 14 paragraphs 93 to 95 the FCA set out that the origin of
 15 business interruption cover was to permit the recovery
 16 of consequential losses from property damage. There had
 17 been authorities saying that that was not covered and
 18 indeed in Argenta it's expressly stated that
 19 consequential loss is not covered. That's at page
 20 {C/5/353}. We don't need to go to it.

21 In other words, business interruption started not as
 22 a peril but as a form of damage involving consequential
 23 loss which was not recoverable in the property section.
 24 It was made recoverable by making Damage into a peril
 25 which was then insured against under the

1 business interruption section.

2 The later addition, historically later, of
 3 non-damage extensions didn't change the analysis, all it
 4 meant was that damage in the form of
 5 business interruption was indemnified if it was caused
 6 either by the originally defined peril Damage or one of
 7 the new non-damage extended perils. My Lords, on this
 8 issue of what counts as the peril, the judgment contains
 9 no reasoning, only conclusions, so there's nothing for
 10 me to take you to in the judgment.

11 The weak support given to the judgment by the FCA's
 12 respondent's written case at {B/10/401}, paragraph 218
 13 where they talk about the provisions of some policies
 14 that may have a causal link between
 15 business interruption and loss, that of course does not
 16 apply to Argenta at all. The points that are made
 17 against Argenta are at paragraphs 219 and 220
 18 {B/10/401}. I'm not going to take time now, but when
 19 your Lordships remind yourselves of paragraph 219 and
 20 220, you'll see that they are purely to the effect that
 21 the issue does not ultimately matter.

22 As to whether the issue doesn't matter,
 23 your Lordships were shown by Mr Crane paragraph 100 of
 24 the judgment, which shows that the Divisional Court
 25 certainly thought that it mattered, indeed thought that

1 it was critical, so it clearly did matter to their
 2 decision, even if it should not have done.

3 So, my Lords, ground 1 of our appeal should succeed
 4 because the words of Argenta correspond precisely to
 5 the orthodox analysis we have set out. There's no
 6 reasoning before your Lordships from the court below to
 7 suggest a contrary answer and there's no reasoning from
 8 the FCA either that could support any different result.
 9 My Lords, we say ground 1 should succeed.

10 My second ground is that the court wrongly concluded
 11 that the words "as a result of" in Argenta's
 12 business interruption extension did not require
 13 proximate cause.

14 Now, my Lords, in the introductory part of the
 15 respondent's written case at {B/10/346}, paragraph 31,
 16 the FCA appears to adopt the view that we criticise on
 17 this point, but in the light of what I'm about to say,
 18 it seems that what they say there is not intended to
 19 apply to Argenta. None of the individual judgment
 20 paragraphs they cite at 31 relate directly to Argenta.

21 Later in the written case, when the FCA deals with
 22 Argenta specifically, at {B/10/401}, where we were just
 23 before, at paragraph 219, which I was referring to on
 24 a slightly different point a moment ago, they say that,
 25 if you look at paragraph 219 going over onto page 402

1 {B/10/401}, the FCA says:

2 "We have misunderstood the judgment on this point."

3 They say that where the term is "resulting from" the
 4 FCA accepts this requires a proximate cause test. They
 5 say there is no dispute on this point and Argenta is
 6 aiming at the wrong target.

7 My Lords, I assume that when they say "resulting
 8 from" they mean "as a result of", which are Argenta's
 9 words, and the point is also made explicitly in relation
 10 to Argenta again in the FCA case at {B/10/443},
 11 paragraphs 361 to 362. So it seems from those
 12 paragraphs as if it is expressly and clearly common
 13 ground on this appeal that the words "as a result of"
 14 mean "proximately caused by".

15 Now, my Lords, I maintain my submission that the
 16 Divisional Court got this point wrong as well, for all
 17 the reasons given in our written case at paragraphs 42
 18 to 46, but given the time constraints, I will assume
 19 that your Lordships will accept what is put before them
 20 as common ground on this appeal and I will not spend
 21 further time on it.

22 But, my Lords, whether because we are right to
 23 criticise the judge below -- the judges below -- in
 24 ground 2 or whether because it's now common ground, in
 25 either event your Lordships should hold that "as

1 a result of" in the Argenta wording are words of
 2 proximate causation.
 3 On that basis, it follows that what Argenta1
 4 actually says is: one, it indemnifies for; two,
 5 business interruption; three, proximately caused by;
 6 four, any occurrence of a notifiable disease within
 7 a radius of 25 miles of the premises.
 8 As the court below acknowledged at paragraph 81,
 9 which, as I say, you've seen before, it has not been
 10 shown in this test case that occurrences within the
 11 radius of any particular Argenta policyholder caused the
 12 governmental measures which caused most of their losses.
 13 That's enough to establish that it has not been shown
 14 that the actual words of Argenta1 are satisfied by the
 15 generality of claims for COVID-19 losses.
 16 The remaining question is whether there's any basis
 17 to read the policy as meaning something different from
 18 what it actually says; and that takes me to ground 3.
 19 Ground 3, my Lords, is that the court wrongly
 20 distinguished Argenta1 from QBE2 and 3 which it had
 21 found were not triggered by most COVID clauses. Like
 22 ground 1, ground 3 of our appeal relates to a point that
 23 was not argued at trial. Nobody suggested that the
 24 points that the court found made QBE2 and 3 different
 25 were relevant points, so we never had the opportunity to

1 address this either as well as to address ground 1.
 2 The court was of course right to hold that QBE2
 3 and 3 did not provide cover, but it was wrong to
 4 distinguish Argenta1 from them.
 5 My Lords, if you go to {C/13/852}, you can see the
 6 operative words of QBE2 at paragraph 3.2.4(c) and they
 7 are:
 8 "Loss resulting from interruption or interference
 9 with the business in consequence of any of the following
 10 events:
 11 "(c) any occurrence of a notifiable disease within
 12 a radius of 25 miles of the premises."
 13 Now, at first sight that's rather similar to the
 14 clause I've been showing you at some length in Argenta.
 15 What's the difference? The answer is given in the
 16 judgment at {C/3/103}, at paragraphs 231 and 232, and
 17 the judges below found two differences.
 18 At paragraph 231, which I think you have seen
 19 already, the point that is being made is that the words
 20 "the following events" in the stem at 3.2.4 of QBE2 show
 21 that what's insured under (a) to (f) are matters
 22 occurring at a particular time in a particular place and
 23 in a particular way, and that relates to the
 24 Axa Reinsurance authority about the meaning of the word
 25 "event". In particular, what their Lordships say in the

1 last eight lines of paragraph 231 is this, they say:
 2 "Given the reference to events and taken with the
 3 nature of the other matters referred to in (a) (b) and
 4 (d) to (f), the emphasis in (c) appears to us in this
 5 clause not to be on the fact that the disease has
 6 occurred within 25 miles, but on the particular
 7 occurrences of the disease within 25 miles. It is the
 8 event which is constituted by the occurrences of a
 9 disease within the 25-mile radius which must have caused
 10 the business interruption or interference. If there
 11 were occurrences of the disease at different times
 12 and/or different places, these would not constitute the
 13 same event and the clause provides no cover for
 14 interruption or interference with the business caused by
 15 such distinct events."
 16 The court thus rightly accepted two points upon
 17 which I rely. First, the other matters in the list of
 18 extended perils are relevant to the construction of the
 19 individual sub-peril with which we're concerned; and
 20 secondly, "event" and "occurrence" are at the very least
 21 capable of being used in the same sense as each other.
 22 There's no problem with an occurrence being an event.
 23 We return now to the Argenta wording at {C/5/317},
 24 but this is also a list of events in the sense in which
 25 that word was used by the court below.

1 "(a) is a closure or restriction on the premises."
 2 That must be an event at a particular time and
 3 place.
 4 "(b) any occurrence of a notifiable disease at the
 5 premises or attributable to food and drink supplied from
 6 the premises."
 7 Plainly an event in a particular time and place
 8 occurring in a particular way.
 9 "(c) a discovery of an organism likely to result in
 10 a notifiable disease plainly an individual event."
 11 We will leave (d) to last. Come to (e):
 12 "Any occurrence" again, this time it can only be
 13 an event in the sense used in the judgment because it is
 14 a murder or suicide at the premises.
 15 Then going back to (d), we have the third use in
 16 this list of five of "any occurrence", and read in
 17 context, it's plain that this kind of any occurrence is
 18 an event in the same sense.
 19 My Lords, in our written case at {B/5/143} at
 20 paragraph 81, we have cited some authorities supporting
 21 the view that "occurrence" is usually used in the sense
 22 of "event". On the next page, at paragraph 82, we've
 23 referred to the primary meaning of the word "occurrence"
 24 from the Oxford English Dictionary. We say that the
 25 natural reading of "occurrence" in this context is the

1 same in our policy as it is in QBE2.
 2 The second difference identified by their Lordships
 3 below is in the judgment at {C/3/103}, paragraph 232,
 4 where their Lordships say that QBE2 states that:
 5 "The insurer shall only be liable for loss at those
 6 premises which are directly subject to the incident."
 7 They find that the word "incident" further
 8 emphasises the focus of the clause.
 9 I've already shown you, my Lords, that the
 10 equivalent provision in Argenta at {C/5/317} refers to
 11 "occurrence, discovery or accident," that's the
 12 exclusion on the right, which gives exactly the same
 13 emphasis in my respectful submission. In any event, if
 14 these words "incident" and "event" are really the magic
 15 word that unlock the obvious construction, they are used
 16 in Argenta1 to cover generally the insured perils under
 17 the policy.
 18 If you go to {C/5/349}, this is in Argenta, near the
 19 beginning of the policy — sorry, it's not near the
 20 beginning, I've got that wrong, near the end, 349, part
 21 of the general conditions, you will see that general
 22 condition 16(2) and 17(1) both refer to incidence in
 23 a way which simply means a matter that might trigger
 24 cover. It means a peril under the policy.
 25 For the word "event" your Lordships can find that in

1 the Argenta policy right near the beginning at page
 2 {C/5/265}. In the first line:
 3 "When an event occurs that may give rise to a claim,
 4 you should contact your broker."
 5 At page 270, in the top paragraph:
 6 Definition of "excess":
 7 "the amount that will be deducted ... from the total
 8 agreed amount of any claim (only one EXCESS will be
 9 deducted from the total amount for claims arising out of
 10 one event) ..."
 11 Using the word "event".
 12 Then, turning back to the end of the policy, at page
 13 {C/5/350}, in the general conditions under the
 14 "Contracts (Rights of Third Parties) Act condition" if
 15 your Lordships go to paragraph 2(4):
 16 "Up to and at the time of the occurrence of any
 17 event which is the subject of any claim under this
 18 policy ..."
 19 The person claiming shall observe fully the
 20 conditions, et cetera.
 21 If those are the magic words, my Lords, we have
 22 them. But, my Lords, we don't make our submissions on
 23 the basis of magic words, as the court below appeared to
 24 make its finding, the fundamental issue is what would a
 25 reasonable business person understand by the term, "Any

1 occurrence of a notifiable disease within a radius of
 2 25 miles of the premises in the context of this policy?"
 3 The answer, we say, is again, with respect, rather
 4 obvious: any occurrence indicates a single event.
 5 You can see what you might call the unities of the
 6 reinsurance kind of event are all present here. If you
 7 look in the judgment at {C/3/84} paragraph 158, your
 8 Lordships see four lines down:
 9 "Further, it is common ground between the FCA and
 10 Argenta that an occurrence of COVID-19 for the purposes
 11 of extension 4(d) requires there to be at least one
 12 person within the relevant 25-mile zone on the relevant
 13 date who has contracted COVID-19 such that it is
 14 diagnosable whether or not it's been verified by medical
 15 testing and whether or not it's symptomatic."
 16 There's never been any dispute about what is the
 17 nature of the occurrence and it is an event. The place
 18 where the event takes place, of course, is expressly
 19 stated to be within a 25-mile radius of the premises,
 20 and the time when a person contracts COVID or comes into
 21 the area already having COVID, is obviously a particular
 22 time. So all the characteristics of an event, as the
 23 Divisional Court used that term, are clearly met.
 24 My Lords, this is a convenient point to mention
 25 an argument that has surfaced in the FCA's respondent's

1 case in several places which is that because we accept
 2 there could be more than one occurrence, it follows that
 3 this becomes an insurance for an outbreak of a disease,
 4 including an outbreak that exists both within and
 5 without the 25-mile radius. That argument involves
 6 a fallacy which is really a jagged fault line running
 7 all the way through the FCA's case, which is the
 8 confusion between, on the one hand, situations that
 9 include the insured peril and on the other, situations
 10 that constitute the insured peril.
 11 To illustrate the point perhaps we can look at
 12 extension 4(b) at {C/5/317} which includes the supply of
 13 food and drink from the premises. So imagine, my Lords,
 14 that some supply of food and drink from the premises
 15 leads one or more customers to contract cholera, which
 16 you saw earlier is a notifiable disease, what
 17 constitutes the insured peril is each occurrence of
 18 cholera that is attributable to the supply from the
 19 premises. It does not matter whether there is one or
 20 more than one such occurrence, if they cause damage to
 21 the business, there's cover for that.
 22 Now, imagine it's discovered that the underlying
 23 cause of the problem was an infection in the mains water
 24 supply of the whole region. It may then turn out that
 25 there was a wider outbreak of cholera which included

1 occurrences attributable supply from the premises and
 2 also included other cases. Extension 4(b) still insures
 3 the consequences of the cases which constitute the
 4 peril, it does not insure the consequences of the whole
 5 regional outbreak, even though they include the
 6 occurrences that form the peril.

7 Now the FCA's response to that answer is what they
 8 call the jigsaw or the indivisible cause argument which
 9 is the subject of Argenta's ground 4.

10 My Lords, the indivisible cause — perhaps we should
 11 just see it where the court has actually declared the
 12 existence of this thing, which is in bundle {C/1/6}. In
 13 relation to Argenta, you see near the top of page 6
 14 declaration 10:

15 "In Argenta1 and other policies the occurrence of
 16 a case of COVID within a relevant policy area is to be
 17 treated as part of one indivisible cause. Namely, the
 18 national COVID—19 outbreak and the governmental and
 19 public reaction of any business interruption.
 20 Alternatively, [and of course will take us to ground 5]
 21 each such occurrence to be treated as a separate but
 22 effective cause of national action and any subsequent
 23 business interruption."

24 Now, my Lords, apart from this case, the combined
 25 might of the FCA's legal team has not been able to

1 unearth one single case or text authority anywhere in
 2 the whole world where the metaphor of a jigsaw or the
 3 analysis of a part of an indivisible cause has been
 4 applied to any form of causation, not just insurance
 5 law. That's because these phrases are euphemisms, they
 6 are fig leaves for overriding all previous concepts of
 7 legal, effective or proximate causation.

8 The two metaphors, which are used interchangeably by
 9 the FCA, are not even compatible with each other,
 10 because the jigsaw obviously is divisible into its
 11 parts. That's the essence of a jigsaw. If a policy
 12 insures one piece of a jigsaw and it turns out later
 13 that that piece which was insured is part of a jigsaw,
 14 it does not follow that the whole jigsaw is what was
 15 insured. That is simply wishful thinking after the full
 16 picture is revealed, contrary to the dictum of
 17 Sir Thomas Bingham which your Lordships were shown by
 18 Mr Crane.

19 The orthodox approach to legal causation is to view
 20 it as a chain. If authority is wanted for that rather
 21 mundane proposition, and perhaps it's not, but you can
 22 find it in our bundles in The Kos at {E/15/298} where
 23 you can see in the judgment of Lord Clarke at
 24 paragraph 75 confirmation that legal causation generally
 25 runs in chains, not in jigsaws or in parts of

1 indivisible wholes.

2 Now, my Lord, I don't mean by saying that to
 3 oversimplify the causal enquiry. The chain of legal
 4 causation is picked out against the background of the
 5 net of factual causation in all its complexity, and it's
 6 that task of picking out the relevant chain which is
 7 ultimately accomplished with the use of the court's
 8 common sense. But the criterion to which the court
 9 applies its common sense is the words of the parties'
 10 agreement in a contract case including an insurance
 11 case.

12 The effect of the jigsaw indivisible cause argument
 13 is the following. The effect is this: square 1 is the
 14 insured peril defined in the policy; occurrences within
 15 25 miles. Instead of going from there directly to the
 16 loss, as you might in any ordinary case, in this case,
 17 you climb up a causal ladder to a more remote cause, the
 18 pandemic. You then slide down a causal snake through
 19 the government reaction in order to reach the final
 20 destination of the loss. But during the whole journey,
 21 you don't go back to square 1. The peril is treated as
 22 just a starting point which has no linear relevance to
 23 the loss that you claim. The effect of the jigsaw
 24 approach is stated in the FCA's respondent's case in
 25 many places, one of them where we can just see two

1 points together so it's convenient is {B/10/347} in the
 2 FCA's respondent's case where, at paragraph 39, they say
 3 this, and we'll obviously need to turn the page in
 4 a moment:

5 "As to this question of construction, the court's
 6 primary findings were that the cover for the disease
 7 outbreak as a whole is not confined to interruption
 8 caused by the part of the outbreak which is inside the
 9 radius. Accordingly, there is cover for the disease if
 10 it has a local presence and the radius qualifier is mere
 11 adjectival."

12 So there's two points there that I want to draw out.
 13 The first is the FCA invites the court to rewrite the
 14 clause so that it insures outbreaks of
 15 notifiable disease. At other times they go further and
 16 they suggest that the insured peril is simply disease
 17 and court sometimes refers to the insured peril as
 18 COVID—19. It's also transparent in the judgment that
 19 the effect of it is to rewrite the clause, and to see
 20 that in relation to Argenta your Lordships can look at
 21 {C/3/85}, judgment paragraph 161.

22 And if your Lordships look at paragraph 161, I'll
 23 paraphrase it if I may. They say: point 1, starting on
 24 the second line, the Argenta clause 4(b) — 4(d) does
 25 not mean what it actually says. Point 2, starting on

1 the fourth line, instead it means something different.
 2 And point 3, this does not violence to the language
 3 used.
 4 Now, with all respect, their Lordships protest too
 5 much. Violence to the language is precisely what they
 6 have done by that form of reasoning.
 7 If a clause did purport to insure an outbreak before
 8 a disease, that word would obviously require definition
 9 because, as Mr Crane reminded you, not all
 10 notifiable diseases are brand-new pandemics where we
 11 know exactly when they started and what a response is
 12 a response to. Many diseases have been around for
 13 centuries and they wax and wane at varying speeds. As
 14 you've seen already at {E/5/88}, mumps and measles are
 15 among notifiable diseases and the policy has to apply
 16 equally to them as it does to COVID-19. And in fact, as
 17 you've seen, Argenta1 does not purport to insure against
 18 outbreaks and it does not purport to insure against
 19 diseases. It only purports to insure against occurrence
 20 of notifiable diseases within a particular radius.
 21 The FCA's emphasis that such — my Lord Lord Leggatt
 22 has a point.
 23 LORD LEGGATT: Are you suggesting, Mr Salzedo, that it's
 24 necessary to prove a causal link for the purpose to
 25 apply between a particular individual case and the

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1 interruption of the business? Surely there can be a set
 2 of cases — even on your construction, wouldn't you
 3 accept that there could be 50 occurrences of a disease
 4 that causes an interruption and you don't have to show
 5 that each is separately and discretely a cause.
 6 MR SALZEDO: Yes, absolutely right, my Lord, I do accept
 7 that and, as I mentioned earlier, that's where the —
 8 the FCA treat this as — that point as if it's
 9 a concession that we're insuring outbreaks and I hope
 10 I dealt with that by saying — by submitting that the
 11 fact that we accept that if there are 50 outbreaks
 12 within a 25-mile radius the question then will be,
 13 "After that date, what did those 50 outbreaks cause?"
 14 does not mean that we accept that we are insuring in
 15 general an outbreak consisting of those 50 plus another
 16 100,000 from somewhere else. And that's the distinction
 17 between the two cases. But, yes, if I spoke as if I was
 18 suggesting that there had to be an individual causal
 19 chain from each one, then I didn't mean that. But of
 20 course it does depend — it may be relevant to the date
 21 on which any claim starts from. If an interruption is
 22 claimed from a certain date, it's the cases up to that
 23 date that have to cause the interruption. There may be
 24 more cases at a later date, there may be different cases
 25 at a later date, and — but I certainly accept it's that

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1 group of occurrences within the 25 miles which are the
 2 insured peril and from which a causal chain must be
 3 picked out to loss.
 4 LORD LEGGATT: Thank you.
 5 MR SALZEDO: Now, given that the Argenta policy does not
 6 purport to insure outbreaks or diseases, your Lordships
 7 might expect to find something in the judgment or in the
 8 FCA's written case to deal with the point of language as
 9 how as a matter of language peril 4(d) could be
 10 understood to mean that there's cover for the effects of
 11 an outbreak as far as the borders of the UK, or maybe
 12 it's England and Wales, or maybe it's England — I'm not
 13 sure what "national" means — but no further.
 14 The only linguistic point made in the judgment to
 15 support this is at {C/3/85}, paragraph 160. And in the
 16 first sentence of 160 their Lordships said:
 17 "Critical here again is in the fact that
 18 Extension 4(d) does not say 'any occurrence of
 19 a NOTIFIABLE HUMAN DISEASE only with a radius of 25
 20 miles of the PREMISES' or anything which dictates such
 21 a reading."
 22 My Lords, there's the obvious point that what's
 23 missing is generally treated to be quite a weak argument
 24 of construction but, leaving that side, there are four
 25 reasons at least — four main reasons I would like to

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1 put forward as to why that proposition makes no sense.
 2 First, the word "only" is implicit in every
 3 definition of an insured peril. If damage caused by
 4 fire is insured by clause X, it's only such damage which
 5 is insured by clause X.
 6 Secondly, adding the word "only" where the court
 7 would have it added seems to mean that the disease
 8 itself must not spread outside the 25 miles in order to
 9 remain a peril. But we've never suggested the fact that
 10 the disease or a given outbreak may include occurrences
 11 outside the radius is an answer to a claim. The
 12 suggested wording by the court, therefore, would impose
 13 a restriction for which we've never contended.
 14 And, thirdly, the word "only" is equally missing
 15 from QBE2 and 3 where its absence did not concern the
 16 court and the same point might be made, while I'm on
 17 this, about any of the alleged anomalies or the
 18 indivisible cause point altogether, as we point out in
 19 our written case at paragraph 94(2). The fact that QBE2
 20 and 3 can be read sensibly free of those concerns shows
 21 that those concerns are not decisive in a way that would
 22 require Argenta1 to be read contrary to its express
 23 terms.
 24 And, fourth, the word "only" is not found in any of
 25 the Argenta BI extensions either. As I showed

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1 your Lordships earlier, peril 4(b), for example, at
 2 {C/5/317} is syntactically identical to 4(d).
 3 In our written case, at paragraph 74(3), we made the
 4 point that the judgment below would imply that 4(b) —
 5 which you remember is cases at the premises or
 6 attributable to food and drink supplied from the
 7 premises — that that clause would cover any loss from
 8 the pandemic, which is even more extraordinary than the
 9 result reached in relation to 4(d).
 10 As Mr Crane mentioned, the FCA's response to that
 11 point is in their written case at {B/10/394} at
 12 paragraph 194. And what the FCA say in paragraph 194,
 13 in the last sentence of that paragraph, is:
 14 "The clause envisages measures directed specifically
 15 at the premises to stop that repetition or spread;
 16 measures that would be taken on a national or wide area
 17 basis. The fortuity is therefore, as a matter of
 18 construction, contemplating and limited to
 19 at—the—premises aspect of any disease, not a wider
 20 outbreak."
 21 So they concede that 4(b) is limited.
 22 They then attempt at paragraph 195 to distinguish
 23 4(d). And the only point they make in paragraph 195 is
 24 that 25 miles is further away and suggests a wider
 25 outbreak and potentially more responsive measures than

1 the words "at the premises".
 2 Now, my Lords, that's true, of course. The question
 3 though is: how much wider? And the answer is given in
 4 the question. It's precisely 25 miles wider.
 5 The FCA does not and cannot point to anything in the
 6 wording of peril 4(d) that would assist a reasonable
 7 reader to understand that the phrase "within a radius of
 8 25 miles" is, in their term, adjectival and thus plays
 9 a quite different role to the words "at the premises" in
 10 4(b).
 11 Now, my Lords, I've got a couple more things to say
 12 about "adjectival", but I see the time and I wonder if
 13 your Lordships would prefer to take a break now.
 14 LORD REED: Yes, thank you, Mr Salzedo. We'll adjourn now
 15 and resume at 2 o'clock. Thank you.
 16 MR SALZEDO: Thank you.
 17 (1.00 pm)
 18 (The luncheon adjournment)
 19 (2.00 pm)
 20 (No audio feed provided from the court)
 21 (2.08 pm)
 22 MR SALZEDO: ... causal effect to qualify. In the case of
 23 insurance, the key question is whether the insured peril
 24 is among those candidate proximate causes. If there's a
 25 dispute, the court then chooses from among those

1 candidate proximate causes and in some cases will say
 2 more than one is of equal efficacy.
 3 The effect of the judgment below on this point is to
 4 say that there's an infinite number of infinitely small
 5 contributions and that adds up to the whole. But anyone
 6 with a mathematical background will tell you that if you
 7 start dividing by zero or by infinitely small
 8 quantities, then your analysis will lead you to
 9 fallacious results. The same is true of causation.
 10 My Lord, Lord Leggatt.
 11 LORD LEGGATT: May I put a hypothetical case to you,
 12 Mr Salzedo.
 13 Suppose that there is a bus standing at the edge of
 14 a cliff and 20 people get together and between them they
 15 push the bus over the cliff leading to its destruction.
 16 We can suppose that any one individual wouldn't nearly
 17 be strong enough on their own to push the bus over the
 18 cliff. Indeed, it would have taken 15 or 16 of them to
 19 do it. That also means that if you ask, in relation to
 20 any one particular individual, whether that person
 21 hadn't taken part would the bus still have been
 22 destroyed, the answer is "yes". But might we not want
 23 to say in that example that each person's contribution
 24 was an equally effective cause of the loss?
 25 MR SALZEDO: My Lord, the final question — obviously

1 an equally effective clause it may well be on
 2 your Lordship's example, but that doesn't make it
 3 a proximate cause because the question is what are the
 4 substantial causes?
 5 In that case, it would depend what purpose you were
 6 asking the question for. I mean, to make it equivalent
 7 to an insurance context, you'd need to be saying that
 8 the bus had insurance against the possibility of
 9 passenger 1 destroying it, but no insurance against the
 10 other 19 doing so.
 11 Now, if that was the position, there would then have
 12 to be a factual enquiry as to what was the nature of the
 13 joining together of the 20 people in their decision to
 14 push the bus over the cliff and what were the causes of
 15 that.
 16 Now, if the position is that passenger 1 was simply
 17 someone who went along, was overborne, perhaps, by the
 18 forceful personalities of some other passengers who
 19 decided that this was the thing to do, then it may well
 20 be that passenger 1's contribution was not a proximate
 21 cause of the loss. If passenger 1 was the ringleader,
 22 then it may be that theirs was. If your Lordship is
 23 simply positing well, as a matter of physical force they
 24 all joined together equally, then my submission is
 25 that's a totally unrealistic example because this isn't

1 a question in physics, this is a question in legal
2 causation and in legal causation what matters is what
3 caused it to happen.

4 Now, as a question of physics you've then got 20
5 exactly equal causes and it may be that a physicist
6 would say that they are all, 20, equally the cause, if
7 that's the case. It may be a physicist could work out
8 you needed ten. In legal causation, the question is:
9 was there some kind of joint effort? Was there a motive
10 force and, if so, what was it and what caused it?

11 My submission is one can come up with logically
12 possible physics examples, but in the law one looks for
13 the proximate causes and in all the time of the
14 development of the common law, as it happened, I'm not
15 sure there's ever been more than two and certainly not
16 more than three. I'm not saying it's impossible, I'm
17 not saying it couldn't be three or four, there's no
18 reason to make a principled division in terms of number,
19 but where there is a reason to take a principle division
20 is in the order of enquiry which is you've got to look
21 for seriously effective causes and then choose you
22 proximate cause or causes from among them.

23 My Lords, the reason you have to do that is because
24 if you use the analysis of the court below and just say
25 you've got an infinite number of infinitely small

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1 causes, then you can prove effectively anything and the
2 certainty of contractual construction is set at nought
3 and, in our submission, that is not the way to go.

4 My Lords, therefore that ground should also be
5 upheld, in my respectful submission.

6 Ground 6 is the Orient—Express which I leave to
7 Mr Kealey.

8 My Lords, can I assist your Lordships any further?

9 LORD REED: Thank you very much, Mr Salzedo.

10 In that case we can turn next, I think, to Mr Kealey
11 on behalf of MS Amlin.

12 Submissions by MR KEALEY

13 MR KEALEY: My Lord, yes, I'm Gavin Kealey and I act for
14 MS Amlin. I shall be making submissions on the disease
15 clauses in the Amlin contracts, on the relevance and
16 application of the factual "but for" causation test in
17 those contracts and generally, and on behalf of insurers
18 on Orient—Express.

19 Now, it's not my purpose to defend either
20 Lord Hamblen or Lord Leggatt in relation to the
21 Orient—Express. They can defend themselves much more
22 adequately than ever I could, but nevertheless I'm going
23 to have an attempt which may or may not be successful.
24 Our written case, my Lords, is at {B/7/205} and it is
25 commended to your Lordships. I commend it to

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1 your Lordships mainly because I had no part in its
2 writing and therefore it is much better than anything
3 that I can actually personally deliver, but it is very
4 good. Any gaps in my oral submissions — and there will
5 be lots of them — can be filled by looking at our
6 written case.

7 Now, in the relation to the Orient—Express, I'll
8 come back to that towards the end of my submissions but
9 we say that the decision of Hamblen J, as then he was,
10 if I can call him that, in Orient—Express is relevant to
11 two essential matters.

12 First, the identification of the insured peril as
13 distinct from the uninsured cause of the insured peril.
14 Secondly, the existence, application and effect of the
15 factual "but for" causation test, both as a matter of
16 contract, but more specifically as a matter of insurance
17 contract law. It is also, as it happens, a decision on
18 wide area damage. It is instructive in the present
19 context of wide area disease, and we say that it was
20 right to decide it both at, as it were, first instance
21 by the arbitral tribunal and also on appeal by
22 Mr Justice Hamblen.

23 Now, you've just heard Mr Crane and Mr Salzedo. We
24 adopt their submissions. Whilst our causes are not
25 identical to those of QBE and Argenta, we say that upon

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1 proper analysis, the differences are not substantive.

2 My Lords, I'm going to be unfortunately a little
3 tedious because I have to take you to the MS A disease
4 clauses before I delve into areas of law of factual
5 causation.

6 Now, there are two MS disease clauses, MS A1 and
7 two. They are materially identical, so I'm just going
8 to focus initially on MS A1 and your Lordship will see
9 MS A1 in {C/10/504} and the relevant page at which you
10 should begin is 504.

11 One thing that you should bear in mind while I take
12 your Lordships through, as it were, the preamble parts
13 of this contract, is that the causal connector in my
14 client's disease clause is the word "following". So
15 when I emphasise the word "following" you'll know why
16 I am placing emphasis on it. If I emphasise another
17 causal connector, you will probably be able to deduce
18 why I'm placing emphasis on that other causal connector.

19 But the welcome page is at {C/10/504}. If you have
20 it in front of your Lordships, it is part of the
21 contract. It is not just a welcome page, rather like
22 a sort of invitation or just say "hello, it's nice to
23 see you", it is actually part of the contract and you'll
24 see that from the second paragraph:

25 "This document, any endorsements, certificates and

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1 the schedules must be read together as one contract as
2 they form your policy.

3 "In return for payment of the premium shown in the
4 schedule, we agree to insure you against ... "

5 The first bullet point is:

6 "Loss or damage you sustain."

7 In other words, physical damage. It's the material
8 damage clause that your Lordships find typical in these
9 contracts. The second bullet point is:

10 "Loss resulting from interruption or interference
11 with a business following damage."

12 The third bullet point, not relevant, is:

13 "Legal liability you incur for accidents."

14 That's the welcome page, and you'll see that it says
15 "following damage". Now if you compare that, my Lords,
16 with the main business interruption insuring clause,
17 which your Lordships will see in the same document at
18 page 560 {C/10/560}, and as I read this out you'll
19 recall the emphasis I placed on "following", following
20 damage. In the insuring clause, the draftsman has
21 said, this is business interruption option, section 6:

22 "For each item in the schedule, we will pay you for
23 any interruption or interference with the business
24 resulting from damage to property used by you at the
25 premises for the purposes of the business occurring

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1 during the period of insurance caused by an insured
2 cover and provided that damage is not excluded under
3 section 1."

4 Now, there are two things to be borne in mind when
5 I read that out and they come to me. Firstly, of course
6 "resulting from" is equivalent to "following". In other
7 words, the draftsman uses "resulting from"
8 interchangeably with "following". My Lords, whether
9 that's as a matter of elegance of prose or whether it is
10 deliberate, I know not, and nor do you but it's quite
11 clear that they are interchangeable.

12 Secondly, and this is just a passing remark of no
13 great significance, but your Lordships may like to point
14 it out or I will point it out to you, it says:

15 "Provided that damage is not excluded."

16 In other words, when the draftsman wants to use a
17 proviso, the draftsman uses a proviso. When it says
18 "provided that damage is not excluded", then that's the
19 proviso that it employed. There is no such proviso in
20 any of the disease clauses. You've heard from Mr Crane
21 and Mr Salzedo on that, but the draftsman in this
22 contract could well have used the same proviso language
23 if he or she had wanted.

24 Definition of damage, because we've seen damage is
25 emboldened, is way back at 512, so it's {C/10/512}. And

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1 damage there, my Lords, is:

2 "Loss or destruction of damage to the property
3 insured as stated in the schedule."

4 In other words, it's physical loss or damage as
5 found by the court below and we don't disagree with that
6 at all.

7 Then your Lordships, I'm afraid to jump again, to go
8 now to bundle {C/10/560}, same bundle. So just below
9 the insuring clause that we've just looked at, we see,
10 as it were, at the second hole punch that your Lordships
11 may or may not have, we have "Claims — basis of
12 settlement A — Gross Profit".

13 It says:

14 "The insurance by this item is limited to loss of
15 gross profit not exceeding the limit of liability due
16 to:

17 "a) reduction in turnover ..." et cetera.

18 Then it says:

19 "... the amount payable will be:

20 "1 for reduction in turnover, the sum produced by
21 applying the rate of gross profit to the amount by which
22 the turnover during the indemnity period will following
23 the damage ..."

24 In other words, that's the amount by which the
25 amount of the turnover will, following the damage, in

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1 other words caused by the damage, "fall short of the
2 standard turnover."

3 Then your Lordships should know the definition of
4 "standard turnover" which is at page 559 {C/10/559},
5 that immediately preceding that on which I am.

6 "Standard turnover" is defined as:

7 "The turnover during that period in the 12 months
8 immediately before the date of the damage which
9 corresponds with the indemnity period to which
10 adjustments will be made as necessary to provide for the
11 trend of the business and for variations in or other
12 circumstances affecting the business had the damage not
13 occurred."

14 So the figures adjusted represent as nearly as be
15 may be reasonably practicable the results which, but for
16 the damage, would have been obtained during the relative
17 period after the damage.

18 So the "but for" factual causation test is directly
19 applicable to the standard turnover and to adjustments
20 to be made.

21 Now, these are very typical clauses. They're called
22 trends clauses, standard turnover clauses. They're
23 covered by my Lord Mr Justice Hamblen in Orient—Express.
24 They are typical of all the contracts with which
25 your Lordships are concerned and indeed the way in which

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1 the court below treated the reference to "damage" in the
2 context of the extensions to business interruption was
3 to replace "damage" with "insured peril" and we don't
4 disagree with that at.

5 In relation to the extensions, the
6 business interruption extensions, it would read:
7 "Affecting the business had the insured peril not
8 occurred so that the figures adjusted represent nearly
9 as may be reasonably practical the results which but for
10 the insured peril would have been obtained during the
11 relevant period after the operation of the
12 insured peril."

13 My Lords, if you could now go to page 566
14 {C/10/566} -- I haven't even got to the disease clause
15 yet, but if you go to 566, you will see the "Action of
16 competent authorities". This is the beginning of the
17 business interruption optional additional cover section,
18 and it's provided as standard. So it comes with the
19 policy, my Lord.

20 "We will pay you for:
21 1. Action of competent authorities.
22 "loss resulting from interruption or interference
23 with the business following action by the police or
24 other competent local, civil or military authority
25 following a danger or disturbance in the vicinity of the

1 premises where access will be prevented provided
2 always ..."

3 Again, my Lords, the draftsman knows exactly what
4 a proviso looks like and can even write it:

5 "... provided always that there will be no liability
6 under the additional cover for loss resulting from
7 interruption to the business during the first 24 hours."

8 My Lords, there's a generous display there of the
9 word "following". Now, en passant, I mention that the
10 court below correctly accepted that the word "following"
11 in that clause meant "caused", not some loose causal
12 connection. Rather, my Lords, a direct causal
13 connection. In other words, the business interruption
14 must have been caused by the action of police,
15 et cetera, and must have been caused by the action of
16 police, et cetera, following a danger in the vicinity of
17 the premises.

18 So you can have a danger in the vicinity of the
19 premises, which could be, in fact, outside the vicinity
20 of the premises as well, but the court below considered
21 that it was only the danger within the vicinity of the
22 premises which was the necessary causal requirement.
23 Your Lordships see that, my Lords, at the judgment at
24 paragraph 437, which if your Lordships could turn to it,
25 is in bundle {C/3/155}.

1 My Lords, I think Mr Crane read 436. I'm going to
2 read 437 to you.

3 "Even if there were total closure of the insured
4 premises pursuant to the regulations, there could only
5 be cover if the insured could demonstrate that it was
6 the risk of COVID-19 in the vicinity in that sense of
7 the neighbourhood of the insured premises, as opposed to
8 in the country as a whole which led to the action of the
9 government in imposing the regulations.

10 "It is highly unlikely that that could be
11 demonstrated in any particular case. The narrow and
12 localised nature of this cover means that the wider
13 issues of causation and counterfactuals, such as we've
14 discussed in relation to Arch and EIO [that's
15 Ecclesiasticals, my Lords] wordings above and such as we
16 discussed earlier in the judgment in relation to the
17 so-called disease clauses and hybrid clauses do not
18 arise."

19 So the court there construed "following" as meaning
20 "caused by" and required that which was local -- that
21 which was local, my Lords -- to be causative of the
22 business interruption.

23 Against that background, my Lords, I now turn to the
24 disease clause which your Lordships will find at
25 page 567. That's {C/10/567}. Which is obviously the

1 primary cause with which I'm concerned at this stage of
2 my submissions.

3 Now, your Lordships see that clause and as you cast
4 your eyes down, you will see that, apart from (a)(iii),
5 every insured peril there identified is something
6 occurring at or from the premises. The exception is
7 (a)(iii). It says:

8 "Consequential loss as a result of interruption or
9 interference with any a business carried on by you at
10 the premises following:

11 "iii. any notifiable disease within a radius of
12 25 miles of the premises ..."

13 Now, there's four specific components to which
14 I wish to draw your attention.

15 First, "notifiable disease" is not an abstract
16 concept, it is a defined term, and the definition, my
17 Lords, you'll find back at page 559 {C/10/559}. It's
18 not disease generally, as the court below appears to
19 have thought. Just for your reference, my Lords,
20 paragraph 196 at {C/3/94}. It is specifically, my
21 Lords, illness sustained by any person resulting from:

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

1 Now, in doing that I've actually missed out (a).
 2 That was actually deliberate so I could emphasise now
 3 (a) because it is:
 4 "Illness sustained by any person resulting from food
 5 or drink poisoning or any human infectious or contagious
 6 disease."
 7 Now, it is all preceded, my Lords, by illness
 8 sustained by any person resulting from (a) or (b). It
 9 is therefore specifically illness or illnesses sustained
 10 by persons resulting in our case from COVID-19. If
 11 a person sustains an illness, in other words falls ill
 12 from disease, that in any normal sense is a form of
 13 occurrence or event. It is specific to that person. It
 14 is something that that person has sustained. It is
 15 something that that person has had, as it were, befallen
 16 upon him. It's not a state. It's not a situation.
 17 It's not a state of affairs. It's not the existence of
 18 something. It is actually someone sustaining illness.
 19 It is an event. It is an occurrence in all about name.
 20 If your Lordships take notifiable disease and the
 21 definition and you plug that in at page 567 to the
 22 notifiable disease clause, it reads as follows, my
 23 Lords:
 24 "Consequential loss as result of interruption of or
 25 interference with the business carried on by you at the

1 premises following illness sustained by any person
 2 resulting from any infectious or contagious disease,
 3 an outbreak of which the competent local authority has
 4 stipulated will be notified to them."
 5 That's the first component.
 6 The second component, my Lords, that you have to
 7 bear in mind is that a boundary is set around the
 8 insured premises. The boundary is "within a radius of
 9 25 miles of the premises". So the cover is in respect
 10 of illness or illnesses sustained by persons resulting
 11 from food or drink poisoning or infectious disease, here
 12 COVID-19, within 25 miles of the insured premises. And,
 13 my Lords, "within" means inside not outside the
 14 boundary.
 15 What the parties have done is to have drawn a line.
 16 The insured takes the risk of illness outside the line,
 17 and the insurer takes the risk of illness within the
 18 line. It's as simple as that.
 19 That which is outside the line, is uninsured; that
 20 which is inside the line, is insured.
 21 Now, as we say in our case, which I've asked you to
 22 read later on, if you haven't already read it, that may
 23 be an arbitrary line, but it is a line.
 24 The third component, my Lords, is the "causal
 25 connector following". That, of course -- and I'm going

1 to come back to that and develop my submissions, that is
 2 a causal connector, there's no dispute between the
 3 parties, and the court held that it was a causal
 4 connector, albeit a loose causal connector. That is
 5 a causal connector linking the 25-mile cases of COVID
 6 with the business interruption and the
 7 business interruption losses.
 8 The fourth component, my Lords, is to a degree
 9 superfluous and even some would say totally inapposite,
 10 but it's the meaning of "consequential loss".
 11 Consequential loss, which is emboldened is defined at
 12 {C/10/512} and you'll ask yourselves why is that fool
 13 Kealey taking us to this? Because I've just said it's
 14 perhaps superfluous and inapposite. But if
 15 your Lordships look at consequential loss, there is some
 16 meaning or sense to my madness. It says:
 17 "Loss resulting from interruption of or interference
 18 with the business carried on by you at the premises in
 19 consequence of damage to property used by you at the
 20 premises for the purpose of the business."
 21 So we've got following damage, we've got resulting
 22 from damage, we've got in consequence of damage. All
 23 those in the eyes of the draftsman and anyone reading
 24 this, we would respectfully suggest, all those causal
 25 connectors are the same. They are all interchangeable.

1 Though the reason why, my Lords, consequence loss might
 2 be regarded as a little inapposite is because if you
 3 plug consequential loss into the notifiable disease
 4 clause at {C/10/567} -- and I hate to read it out, but
 5 I have to -- and your Lordships will see why it makes
 6 little sense, because it says:
 7 "We will pay you for loss resulting from
 8 interruption of or interference with the business
 9 carried on by you at the premises in consequence of
 10 damage to property used by you at the premises for the
 11 purpose of the business as a result of interruption of
 12 or interference with the business carried on by you on
 13 at the premises following any notifiable disease ..."
 14 Which, you might say, makes little or no sense, but
 15 there is some sense. The idea of consequential loss
 16 being plugged in there in conjunction with "in
 17 consequence of damage" indicates that the draftsman,
 18 whether not terribly well done or terribly ill done, was
 19 trying to convey the causative connections that we say
 20 exist between insured peril and business interruption
 21 and business interference which we say is the loss. We
 22 endorse what Mr Salzedo said before us.
 23 Now, I'm going to repeat something that one of my
 24 learned friends, probably both of them, said before me
 25 and there fore you will say "Well, don't say it", but

1 I'm going to say it nevertheless until you tell me to
 2 shut up, which is that those parts of clause 6 which
 3 talk about disease or other perils at the premises, the
 4 FCA has accepted, it seems, that "following" does not
 5 denote some loose causal connection. But, rather, we
 6 would say a tight causal connection such that what
 7 occurs at the premises must be the source of and so must
 8 have caused the business interruption at the premises.

9 Put another way, the FCA have accepted in relation,
 10 for example, my Lords, to 6(a)(i) that this is not
 11 a cause of the insured being covered for
 12 business interruption at the premises resulting from
 13 notifiable disease everywhere in the country, provided
 14 that someone at the premises at some stage can be proved
 15 to have sustained disease there.

16 My Lords, that you will see reflected at
 17 paragraph 194 of the FCA's respondent's case and 195,
 18 that's at {B/10/394}.

19 Now, the FCA has not told us what it thinks is the
 20 correct answer to the interpretation of "following" in
 21 relation to those parts of the definition of
 22 "notifiable disease" which comprise illness sustained by
 23 any person resulting from food or drink poisoning. Must
 24 those illnesses have caused business interruption at the
 25 premises or is it sufficient for recovery that there

1 should be business interruption at the premises as
 2 result of food or drink poisoning anywhere in the
 3 country, provided that someone may be proved to have
 4 sustained similar food or drink poisoning at the
 5 premises? The answer to that is obviously not.

6 It would be ludicrous to suggest that the food and
 7 drink poisoning at the premises should not have been
 8 directly causative of the business interruption, but
 9 that is part of the definition of "notifiable disease"
 10 and one can imagine who will drink poisoning in the area
 11 of the premises up to 25 miles, even possibly, I can't
 12 think of many instances, but it's not impossible. It's
 13 quite clear, in our respectful submission, that when you
 14 have one causal connector following in one clause, one
 15 would expect it to mean the same thing in respect of (a)
 16 (i), (ii), (iii), (b), (c) and 4, not something
 17 different.

18 We would endorse the suggestions made by my learned
 19 friends before me that "following" there, the
 20 implication of my learned friends' submissions,
 21 "following" there is a causal connector, it's not
 22 a loose causal connector and we're going to tell
 23 your Lordships in a moment that it means proximate
 24 cause, equivalent to, resulting from or in consequence
 25 of, and we'll also going to tell your Lordships that it

1 doesn't much matter at the end of the day, even if it is
 2 a looser connecting cause, because we say that the
 3 factual causation test must apply. Once you have
 4 a cause, it's either a cause or it's not a cause and,
 5 therefore, by definition, if you have a cause, the
 6 "but for" factual causation test must be satisfied.

7 So after that rather terse introduction, my Lord,
 8 the key question on the MS A disease clause is framed by
 9 the language of the contract. It is this: did illness
 10 or illnesses sustained by any person or persons
 11 resulting from COVID-19 within 25 miles of the insured
 12 premises cause business interruption or interference at
 13 those premises and the business interruption losses
 14 claimed by the insured? That question has two elements.
 15 The first, on which I have already made submissions, is
 16 illness sustained by any person resulting from COVID-19
 17 within 25 miles of the insured premises.

18 The second element, on which I've also made some
 19 submissions, is causation. Assuming that the insured
 20 can prove cases of illness within 25 miles, have those
 21 cases so operated as to satisfy the causal connection
 22 that has to be established between those cases and the
 23 business interruption losses for which the insureds
 24 claim an indemnity under the MS A policies.

25 This second element, as you know, arises in the

1 specific context of contracts of insurance. As my Lord
 2 Lord Hodge said in McGowan's Executors, your Lordships
 3 will see that, I needn't take it out, it's at bundle E,
 4 divider 43, page 1196 {E/43/1996} which, as my Lord,
 5 lord Hodge, knows it's a Scottish case, but it's equally
 6 applicable in this instance to this country. As my Lord
 7 said:

8 "The context is important whenever questions of
 9 causation are being asked."

10 That's paragraph 13 of my Lord's opinion:

11 "Because it determines the nature of the causal
 12 investigation."

13 Those are almost his words. As in this case, as in
 14 that case, so also in this. The relevant context is
 15 contracts of insurance and more specifically, my Lords,
 16 insuring clauses within those contracts.

17 If I can answer a question that my Lord Lord Leggatt
 18 asked a moment ago in relation to buses or a bus, the
 19 causation question is not an abstract one as to cause.
 20 It is not what was the cause of the
 21 business interruption losses suffered at the insured
 22 premises. That is, with respect, the wrong question.

23 Rather, it is: did the insured peril cause the
 24 business interruption losses at the insured premises
 25 within the meaning and application of the causal

1 requirements of the insurance contracts? So taking my
 2 Lord's example, a bus and 20 people pushing the bus,
 3 well if only one person of those was an insured, or if
 4 only that person's efforts were insured, the question
 5 would be: did that one person cause the bus to go over
 6 the cliff? The answer to that, dare I say it, unless he
 7 was a Hercules of Herculean proportions and all the
 8 others were very, very small and weak people, the answer
 9 to that is probably no, because that person cannot
 10 satisfy the factual causation requirement of "but for".
 11 In other words, he cannot satisfy the factual cause
 12 test. But for that person's efforts, the bus would
 13 still have gone over the cliff and that's the answer, in
 14 our respectful submission, to my Lord Lord Leggatt's
 15 question. I hope that's the right answer. Anyway,
 16 that's my answer.

17 We say that the causal connection that the insured
 18 has to prove between the 25-mile cases and the BI losses
 19 at insured premises is one of or akin to proximate
 20 cause. We say that based on the language and the law,
 21 but irrespective of that, as I've just indicated, the
 22 minimum causal connection that the insured has to prove
 23 is that the business interruption losses would not have
 24 been suffered but for those proved 25-mile cases of
 25 COVID-19. That, my Lords, is the basic and fundamental

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1 factual causation test found in contract and in tort,
 2 with very few and very exceptional exceptions on which
 3 no party relies in this case.

4 We say, as a matter of simplicity, X cannot in any
 5 sense be a cause of Y, whether proximate or not, if Y
 6 would have happened irrespective of X. In other words,
 7 but for X.

8 My Lord.

9 LORD LEGGATT: On that basis, Mr Kealey, it means, in my
 10 example, none of the people caused the bus to go over
 11 the cliff.

12 MR KEALEY: And that is why --

13 LORD LEGGATT: You can equally say of any individual that
 14 their efforts alone were not. So you embrace that
 15 conclusion, do you?

16 MR KEALEY: No, I just tell your Lordship that
 17 your Lordships just asked the wrong question. If you
 18 are, say, a scientist and you're asking the question:
 19 what caused the produce go over the cliff? You would
 20 say it was the joint efforts of all 20. But that's not
 21 the right question. The scientist is not an insurance
 22 contract lawyer and is not looking at the right
 23 question. The right question is the question that
 24 I identified, which is: is that one person, if that one
 25 person is the insured, did he or she cause the bus to go

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1 over the cliff?

2 Now, the answer to that is no because but for that
 3 one person's effort, the bus would still have gone over
 4 the cliff and therefore, dare I say it -- and I don't
 5 mean to say it without respect, I'm saying it with the
 6 utmost respect -- you've asked the wrong question. What
 7 caused business interruption losses at everybody's
 8 restaurant, say, in England? Well, it's the national
 9 lockdown or the public disinclination to go to
 10 restaurants because they don't want to die of COVID-19
 11 or whatever it is. That is the scientist or the medical
 12 expert or the politician's question and the answers.

13 If your Lordship asks: did 25-mile radius cases of
 14 COVID-19 cause that restaurant to shut down? The answer
 15 is, and given by the court below, no. The answer given
 16 by the court below was different because of its approach
 17 to causation, but the answer -- the right answer -- is,
 18 no, those cases didn't. You're not asking the right
 19 question if you say: "What caused the restaurant to
 20 close down?" You should be asking: "Did the
 21 insured peril cause the restaurant to close down?" That
 22 is the very important point that I made earlier by
 23 reference to what my Lord Lord Hodge said in McCann's:
 24 "The context is important because it determines the
 25 nature of the causal investigation."

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1 In fact, my Lord, it determines the question, it
 2 determines the causal investigation.

3 LORD LEGGATT: Mr Kealey, at the risk of commanding your
 4 respect, even utmost respect again, I'm going to try
 5 another hypothetical on you, if I may.

6 MR KEALEY: That's a bit frightening, no.

7 LORD LEGGATT: This time it's the board of a company and
 8 they decide at a company directors' meeting to put on
 9 the market a dangerous product and it only requires
 10 a majority of the board to vote for that, but in fact
 11 they unanimously vote for it. One of them is insured
 12 under directors' liability insurance and he makes
 13 a claim on the basis that his vote, for which he has
 14 subsequently incurred liability, let's say, of damages
 15 as a cause of the dangerous product going on the market.
 16 Now, if you look at his vote in isolation it would have
 17 made no difference if he had voted the other way because
 18 the decision would have been just the same, so it's not
 19 a "but for" clause (overspeaking).

20 MR KEALEY: (Overspeaking). Wrong question, my Lord.

21 LORD LEGGATT: On your analysis is uninsured because it's
 22 not a proximate cause.

23 MR KEALEY: Wrong question. You're talking about
 24 a liability insurance, D and O liability insurance. If
 25 that director has been found liable or his liability is

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1 established by judgment, settlement or award, that is
2 an insured peril that has arisen under the contract of
3 insurance and that is the proximate cause of the loss
4 under the insurance policy and he's entitled or she's
5 entitled to be indemnified.

6 So with the utmost, utmost respect, my Lord, I would
7 say that if you're looking at different types of
8 contracts of insurance, you may have to ask different
9 types of questions to come to the right answer.

10 LORD LEGGATT: Right, okay.

11 MR KEALEY: I'm sure your Lordship is going to find a much
12 more difficult question for me to answer in due course,
13 which is why I'm going to rush to the end of my
14 submissions before you've had the time.

15 Now, the importance, my Lords, of the causal
16 investigation is heightened by the FCA's fundamental
17 case that there is a single proximate cause of all
18 losses suffered by all insureds under all wordings
19 without distinction. You can look at it later, I'm
20 going to tell your Lordship what the FCA says.

21 Particulars of claim, paragraph 53.1, that's at
22 {D/16/1582}. The FCA says that the proximate cause of
23 all losses is:

24 "The nationwide COVID-19 disease, including its
25 local presence or manifestation and the restrictions due

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1 to an emergency danger or threat to life due to the harm
2 potentially caused by the disease."

3 The FCA then refined its case a little bit, I don't
4 actually think that it was much of a refinement, it
5 looks like a slightly more generous approach. In its
6 trial skeleton, that is the skeleton below,
7 paragraph 225 {D/20/1603} the FCA said:

8 "The single [the definite article] the single
9 proximate cause is the disease everywhere and the
10 government and human responses to it."

11 I need you to bear that in mind, my Lords.

12 We say that there's an obvious disconnect between
13 what the FCA says is the proximate cause of all losses
14 suffered by the insureds and what is insured under my
15 singular Amlin disease clause. It is this disconnect
16 which in our submission causes the FCA real problems,
17 and it sought to surmount them in essentially two ways.

18 First, as we've seen, it seeks to introduce the
19 proximate cause of all the insured's BI losses into the
20 insuring clause through the front door of construction
21 by the use of what we say is an absent proviso.

22 Secondly, it seeks to introduce the proximate cause
23 of all the insured's BI's losses into the counterfactual
24 by the back door of causation reversing not just the
25 insured's 25-mile cases of illness, but much more

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1 besides, including the underlying source or cause of
2 those cases. In other words, the disease everywhere
3 else.

4 Now, neither of those attempts works, however, and
5 that's because, my Lords, what was covered were cases or
6 incidence of illness sustained by individuals as a
7 result of COVID-19 within 25 miles of insured premises,
8 but those were not causative of any loss at those
9 premises. Whilst what was causative was the national
10 COVID-19 pandemic and the responses of the government
11 and public to that national pandemic, but that was not
12 covered. The FCA and the court below have, with
13 respect, conflated what was covered but not causative
14 with what was causative but not covered.

15 With that I turn back to the definition of
16 "notifiable disease". We say that the insuring
17 agreement was clearly confined to cases of specific
18 illness sustained by specific persons as result of the
19 COVID-19 within and that means, my Lords, not outside
20 the boundary of 25 miles. It's a basic line.

21 Can I ask your Lordships in due course to focus on
22 paragraphs 37 and 39 of our case, the Amlin case
23 {B/7/219}. The cases of illness beyond the boundary of
24 25 miles are simply irrelevant. The insuring agreement
25 did not extend to any national or global epidemic or

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1 pandemic. That might be the cause of individual cases
2 of illness within 25 miles, but it's not insured. It
3 didn't extend to any national, global, pandemic or
4 epidemic provided just one case of COVID-19 could be
5 proved, perhaps years after the event, to have existed
6 within the 25-mile radius. That, is my Lords,
7 a misconstruction of the policies: see paragraph 24.1 of
8 our case at {B/7/213}. Your Lordships should know that
9 if that had been the intention, my Lords, then it was
10 very easy to do, all one needed to do was say:

11 "Following any notifiable disease, provided that
12 there is a case of it within a radius of 25 miles of the
13 insured premises or following any notifiable disease
14 anywhere as from the date when the insured proves a case
15 of notifiable disease within a radius of 25 miles of the
16 insured premises to have occurred."

17 That's what should have been in the clause in order
18 to, as it were, maintain the FCA's construction and
19 that's nowhere near the clause.

20 My Lords, I mean one can imagine we've taken, as
21 they say, extreme examples but one can imagine how
22 ridiculous this is. You have the Scilly Isles without
23 a case of COVID-19 for months, but a trawler goes by and
24 on that trawler someone contracts COVID-19 and it
25 happens to be within 25 miles of the Scilly Isles. It

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1 has no causative impact whatsoever. In fact, the person
 2 on board doesn't know that he or she has COVID-19 and
 3 when the trawler docks, say, at Southampton, that person
 4 is tested and is found to have had it for a week.
 5 Suddenly every single business in the Scilly Isles,
 6 which has suffered business interruption losses as
 7 result of the government's lockdown, can recover all
 8 their business interruption losses.

9 Let's say that someone with COVID-19, I don't know
 10 who it could be, but with COVID-19 travels from London
 11 to Edinburgh. Anywhere within 25 miles of that railway
 12 line would suddenly be able to recover all their
 13 business interruption losses as a result of that one
 14 person travelling up on a railway line, 25 miles either
 15 side of the railway line, even though all their
 16 business interruption losses were actually attributable
 17 to the government lockdown.

18 Further, my Lords, any case of illness sustained by
 19 individuals as a result of COVID-19 within 25 miles of
 20 insured premises are simply not indivisible from cases
 21 of COVID-19 sustained by individuals beyond that
 22 boundary. Dare I say it, my Lords, my illness is not
 23 your illness. My pathogen is not your pathogen and
 24 they're not somehow rendered indivisible by virtue of
 25 deriving from the same virus or being part of the same

1 global pandemic or national epidemic. These
 2 distinctions, that's to say between COVID-19 within 25
 3 miles and COVID-19 outside 25 miles, are required to be
 4 drawn by the definition of "notifiable disease" and the
 5 25-mile circumscription by radial distance of the
 6 insured premises. That, my Lord, with respect,
 7 despatches the court's finding, judgment paragraph 111,
 8 that's {C/3/69} and at paragraph 532, see {C/3/179} and
 9 indeed the FCA the's argument of indivisibility such
 10 that the disease in the UK was somehow one indivisible
 11 cause of all business interruption losses and therefore
 12 somehow or other the cases of disease within 25 miles of
 13 premises are harvested by some magical process into the
 14 epidemic or the pandemic. That just doesn't work as
 15 a matter of logic.

16 My Lords, I now turn briefly to the cause -- well,
 17 actually not so briefly -- but briefly to the causal
 18 connector of "following". Yes, my Lord. My Lord,
 19 Lord Briggs.

20 LORD BRIGGS: (Inaudible) the expressions, and I'll for this
 21 purpose include disability, have to be looked at in
 22 context. I think it may be that one wouldn't -- you and
 23 I, if we each separately and on different days got COVID
 24 of different severities in different places would think
 25 that they were thoroughly divisible in terms of their

1 (Inaudible) and all sorts of other things. But where
 2 it's divisible for the purposes of assessing what effect
 3 it had on the government reaction and the restrictions
 4 the government imposed, might lead to a very different
 5 conclusion, might it not?

6 MR KEALEY: Your Lordship is absolutely right, absolutely
 7 right on that, but the way in which it was approached by
 8 the court below was, as I think one of my learned
 9 friends has already said, if one looks at the court
 10 below, the court below asked the question or set out the
 11 proposition, and I'll find it, if your Lordship can just
 12 forgive me for one second.

13 It was whether the insured could recover for
 14 business interruption losses at their premises even --
 15 ah, here it is, my Lord -- it's at paragraph 81 of the
 16 judgment at {C/3/57}. The court asked the question
 17 whether:

18 "There is cover in respect of a pandemic where it
 19 cannot be said that the key matters which led to
 20 business interruption and in particular the governmental
 21 measures would not have happened even without the
 22 occurrence of COVID-19 within the specified radius."

23 That's at {C/3/57}. We say that the answer to that
 24 question must be no. Your Lordship is entirely right,
 25 it really does depend upon not only the facts of course,

1 as your Lordship has postulated, but it really does
 2 depend -- I go back to the point which it depends on the
 3 context in which the question is asked and in which case
 4 one has to ask the right question.

5 Talking about "following", my Lord, "following"
 6 imports a causal connector. Everyone is agreed on that.
 7 In fact, one of its prominent dictionary synonyms
 8 include resultant, resulting, ensuing consequent. See
 9 our case at footnote 15 {B/7/226}. The FCA and the
 10 court held that "following" imports something looser
 11 than proximate cause and we don't accept that. I've
 12 explained to you why.

13 "Following", my Lord, firstly -- and I will take
 14 this very briefly -- is the causal link between the loss
 15 and the peril. We endorse what Mr Salzedo said and we
 16 endorse not only what we said, but we say that where the
 17 clause says "Loss resulting from interruption or loss as
 18 a result of interruption following notifiable disease"
 19 the loss and the interruption are there, my Lords, we
 20 say part and parcel of the loss. In other words, the
 21 interruption is damage to the insured interest and the
 22 loss is simply the pecuniary consequence of that damage
 23 to the insured interest.

24 We say that "following" is actually the causal link
 25 between the loss and the peril and therefore the default

1 position of importing the proximate cause test under
2 section 55 of the Marine Insurance Act 1906 applies: see
3 paragraph 59 of our appellant's case {B/7/228}.

4 As I've said before, these are not essential planks
5 of our argument, the essential plank of our argument
6 stands regardless of whether the insured peril includes
7 or doesn't include business interruption or interference
8 and regardless of whether "following" means proximate
9 cause or some looser causal connection. The essential
10 plank of our argument is that on its proper
11 construction, the minimum causal connection that the
12 insured has to prove is that the BI losses at the
13 insured premises would not have been suffered but for
14 the 25-mile cases of illness.

15 That was rejected by the court below. The court
16 below rejected the submission that the word "following"
17 involved the application of any "but for" test, despite
18 emphasising and repeating that the word still involved
19 a causal connection. The court below espoused a test of
20 causation that seemingly does not accept the "but for"
21 principle and the FCA, my Lord, says that the "but for"
22 causation test is only relevant to quantification and
23 your Lordships will see that in their case at a number
24 of paragraphs: 11.4, 11.8, 31, 32, 33, 214, 355.

25 It's only relevant to quantification, says the FCA,

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1 and not to the causal link between the disease and the
2 interruption or even to the link between the
3 interruption and the loss. The FCA does not accept that
4 "but for" is an inherent part of or a necessary
5 precursor to proximate cause: see their case at
6 paragraphs 31 and 32. So a proximate cause can exist
7 despite not satisfying the factual "but for" test.
8 That's the FCA's case.

9 It disputes, my Lord, the application of the
10 "but for" test in causation even outside the field of
11 insurance: see the FCA's respondent's case at
12 paragraph 374 {B/10/449}. The FCA also says that there
13 is no insurance case which refers to the "but for" test
14 as part of but a precursor to the proximate cause test.
15 My Lords, in our respectful submission, not only is that
16 wrong, but again it's answering the wrong question.

17 The right question is whether there are any cases
18 where something has been held to be a proximate cause
19 which is not a "but for" cause. With the exception of
20 cases of multiple wrongdoers and cases of exceptions
21 such as the Fairchild v Glenhaven and the area of
22 fault (?), which isn't a proximate cause case, the answer
23 to that is no. With the exception of exceptional cases,
24 we haven't found any authority that defines a proximate
25 cause which does not satisfy the "but for" test, nor, it

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1 would seem, has the FCA otherwise we would have received
2 that authority from them.

3 The "but for" test, the factual causation test, this
4 is important, is intrinsic to contracts and to contracts
5 of insurance, because it is intrinsic to the essence of
6 the insurer's indemnity obligation and to the insured's
7 relative right to an indemnity. Contracts of insurance
8 are contracts of indemnity. They indemnify against loss
9 caused by a peril insured against. If but for the peril
10 there would have been no loss, there is no indemnity.
11 I'm going to come back to that in a minute.

12 But I want to start with the established legal
13 background to the Amlin contracts ie the legal
14 background, the legal context in which those contracts
15 were entered into. Now you know, I hope, and certainly
16 I submit, that the law employs the "but for" factual
17 causation test as an undemanding essential threshold
18 test to distinguish causes from non-causes, necessary
19 but not sufficient.

20 Now, sir Christopher Staughton said in
21 Assicurazioni Generali v Arig, at paragraph 187, that's
22 {E/9/161} in the context of inducement:

23 "Causation cannot in law exist when even the 'but
24 for' test is not satisfied."

25 If the parties to the Amlin policies had wanted to

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1 indicate something non-causal, they could have used
2 language such as "connected with" or "relating to".
3 They didn't. They used "following" and that is a causal
4 connector and therefore the factual causation test has
5 to be satisfied. That which is said to have followed
6 an event must by definition be something that would not
7 have followed but for that event. There is nothing in
8 the policy wording, we submit, to indicate any intention
9 to adopt some novel or bespoke concept of causation
10 which doesn't entail the basic factual cause test,
11 contrary to the court's judgment.

12 Construing the MS A's disease clauses against the
13 established legal background, we say it imports the
14 "but for" test. So starting with the legal background,
15 I will take this quite quickly and move to insurance
16 contracts particularly.

17 Whenever a legally relevant cause needs to be
18 selected, such as proximate cause in insurance, the
19 "but for" test provides a range of candidates that
20 satisfy the factual causation enquiry for which the
21 legally relevant cause is to be selected. The
22 "but for" test of factual causation does not replace or
23 supplant the test of legal causation. Now, that
24 two-stage process was described by Lord Hobhouse in
25 a case. Could I asked your Lordships to take out

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1 {E/35/1005} and go to the case of
 2 Reeves v Commissioner of Police, that's bundle E,
 3 divider 35 at page 1005. I'm not going to take your
 4 Lordships to many authorities because I know time is
 5 short, but I'm going to take your Lordship to this and
 6 one or two others.

7 At 1005 at letter C, B to C, lord Hobhouse said:
 8 "Any disputed question of causation factual or legal
 9 will involve a number of factual events or conditions
 10 which satisfy the 'but for' test. A process of
 11 evaluation and selection has then to take place. It
 12 may, for example, be necessary to distinguish between
 13 what factually are necessary and sufficient causes. It
 14 may be necessary to distinguish between those conditions
 15 or events which merely provide the occasion or
 16 opportunity for a given consequence and those which in
 17 the ordinary use of language would, independently of any
 18 imposed legal criterion, be said to have caused the
 19 relevant consequence. Thus, certain causes will be
 20 disregarded as insignificant and one cause may be
 21 selected as the cause. It is at this stage that legal
 22 concepts may enter in either in a way that is analogous
 23 to a factual assessment as for proximate cause in
 24 insurance law or in a more specifically legal manner
 25 than the attribution of responsibility bearing in mind

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1 responsibility may not be exclusive. In the law of tort
 2 it's the attribution of responsibility that is assumed
 3 that is the relevant legal consideration."

4 This "but for" test also applies to the assessment
 5 of a liability to pay contractual damages at common law.
 6 The two-stage enquiry was described by my Lord
 7 Lord Leggatt, with whom the other members of the Court
 8 of Appeal agreed in a recent case called *Minera Las*
 9 *Bambas v Glencore*. You needn't take it out, I'm going
 10 to read out to your Lordships the passage, unless the
 11 author, which is, to look at his own words, at bundle
 12 {G/139/2405}. What the judge then said is as follows:
 13 "The distinction between factual and legal causation
 14 is well recognised in assessing liability to pay damages
 15 at common law. In order to recover damages for a loss
 16 caused by a breach of contract or other actionable
 17 wrong, both tests must generally be satisfied. The test
 18 of factual causation is whether, but for the defendant's
 19 breach of contract, the loss would have occurred. This
 20 requires a simple factual comparison to be made between
 21 the claimant's actual financial position and the
 22 financial position which the claimant would have
 23 occupied if there had not been a breach. However, not
 24 every loss or gain which would not have occurred but for
 25 the breach is treated in law as caused by the breach

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1 such that the defendant is held legally responsible for
 2 it. In particular, an unreasonable act or omission of
 3 a claimant about which loss wouldn't have occurred may
 4 be held to break the chain of causation."

5 Now, my Lords, that's a classical, if I may
 6 respectfully suggest, established description of
 7 causation. Anyone agreeing a contract should, as
 8 a matter of fact or context, be taken to have it in
 9 mind. Lord Justice Leggatt's description, in fact,
 10 echoed that authoritatively stated by Lord Nicholls in
 11 the tort of conversion case, I will give you the
 12 reference, my Lord, it's *Kuwait Airways v Iraqi Airways*,
 13 it's at {E/25/803-804} and that's a description by
 14 Lord Nicholls and he says:
 15 "I take as my starting point the commonly accepted
 16 approach that the extent of a defendant's liability for
 17 the plaintiff's loss calls for a twofold enquiry:
 18 Whether the wrongful conduct causally contributed to the
 19 loss and, if it did, what is the extent of the loss for
 20 which the defendant ought to be held liable. The first
 21 of these enquiries widely undertaken as a simple
 22 'but for' test is predominantly a factual enquiry."
 23 Now, as it happens, Lord Hoffmann agreed with Lord
 24 Nicholls. The FCA relies upon the extrajudicial
 25 writings of Lord Hoffmann a few years later in which

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1 Lord Hoffmann says of the two-stage test is not
 2 recognised in English law. I suspect Lord Hoffmann had
 3 overlooked his own involvement and agreement in
 4 *Kuwait Airways* that there was a two-stage process, but
 5 that's just by the way.

6 The FCA's assertion that there is no established
 7 two-stage causation test is wrong. Importantly, as
 8 we're speaking in the context of insurance, the
 9 "but for" test is also an established and essential
 10 component of any insurance contract. This is important,
 11 my Lords, because we say the FCA doesn't quite
 12 understand, we say with respect, the character of
 13 an insurance contract.

14 It's a contract of indemnity. As my Lord
 15 Lord Leggatt said in *Endurance v Sartex*:
 16 "The insurers under the contractual obligation to
 17 hold the insured harmless from loss caused by an insured
 18 peril to prevent the indemnified person from suffering
 19 loss that is *damnum*.
 20 "The insurers automatically in breach of contract
 21 and liable in damages if an insured peril operates and
 22 causes the insured indemnifiable harm. The insured is
 23 therefore entitled to be put by the insurers into the
 24 position in which he would have been but for the breach
 25 and no better and no worse."

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1 My Lord, I won't repeat what you said in *Endurance*.
 2 It's at {E/37/1053}. Your lordship said in different
 3 terms in *Minera Las Bambas* at {G/139/2396}.
 4 This is the important bit, my Lord. If but for the
 5 insured peril operating the insured would have been in
 6 exactly the same position, then the insurer has not even
 7 breached its insurance obligations. There will have
 8 been nothing from which the insurer was bound to hold
 9 the insured harmless. There will have been no
 10 indemnifiable harm. Therefore, but for the insured
 11 peril, but for the insured peril, the insured would have
 12 suffered exactly the same harm and therefore the breach
 13 of contract, or the supposed putative breach of
 14 contract, will not even have occurred, because the
 15 insurer is only in breach if the insured suffers *damnum*
 16 as a result of the insured peril. If but for the
 17 insured peril the insured would have suffered the same
 18 *damnum*, ergo the insured peril caused no indemnifiable
 19 harm, the insured was never in breach of any contract.
 20 Finally in this context -- I'll have to rush
 21 a bit -- the "but for" test is also an inherent part of
 22 the proximate cause test. An insured peril cannot even
 23 begin to be a proximate cause unless it is also
 24 a factual cause. That's clear, my Lords, from the
 25 judgment of Lord Justice Lindley in the case of

1 *Reischer v Borwick*. That's in {F/40/829}.
 2 If your Lordships look -- and I don't invite
 3 your Lordships to do so now because of time -- at
 4 {F/40/831-833}, it's clear that a proximate cause is
 5 necessarily one that has a minimum is a "but for" cause,
 6 and that appears from Lord Justice Lindley's judgment.
 7 It also appears, my Lord, appears from my Lord
 8 Lord Hodge's opinion in the case of *McCann*, the case to
 9 which I referred earlier. I'll quote from Lord Hodge at
 10 {E/43/1200} where my Lord said:
 11 "It appears to me that in using the concept of
 12 proximate cause the court in most circumstances applies
 13 not only a 'but for' test to establish a causal
 14 connection between two or more events on a particular
 15 occasion, but also further tests such as directness of
 16 effect and the degree of causal contribution of an event
 17 to identify an operative cause."
 18 That's at paragraph 12 of my Lord Lord Hodge's
 19 opinion, cited with approval by Lord Clarke in *The Kos*.
 20 That's {E/15/298}. It also happens to have been
 21 followed by Mr Justice Hamblen, as then he was, in the
 22 *Orient-Express*.
 23 Even where the insurance contractual language
 24 mandates a looser causal connection than proximate
 25 cause, such as by the use of the phrase "attributable

1 directly or indirectly to", the courts have held that at
 2 a minimum the "but for" test must be applied. The
 3 Master of the Rolls, Lord Phillips, said in
 4 *Blackburn Rovers v Avon Insurance*, an insurance case:
 5 "Disablement cannot be said to be attributable
 6 either directly or indirectly to a pre-existing
 7 condition unless at the least the condition is a *causa*
 8 *sine qua non* of the disablement."
 9 That's at {E/11/195}. Then there's one final point
 10 on "but for" causation, my Lords. The FCA refers to
 11 concurrent interdependent and so-called concurrent
 12 independent causes in its written case. It's very
 13 important to bear in mind the differences between the
 14 two.
 15 Where the insurer's loss is attributable to at least
 16 two causes in combination, in the sense that the loss
 17 would not have happened if only one of the causes had
 18 been operative and each is a proximate cause, that
 19 situation is one of concurrent interdependent causes.
 20 In that situation, both causes satisfy the "but for"
 21 test precisely because the loss would not have happened
 22 if either one had not been operative. In that case, the
 23 law is that the insured can recover so long as one of
 24 the causes is insured and the other is not excluded: see
 25 *Wayne Tank and Miss Jay Jay* at {F/50/1045}, {E/23/580}.

1 *Wayne Tank and Miss Jay Jay* and all the cases
 2 applying the principles established in those cases,
 3 including the *B Atlantic*, see Lord Mance, that's at
 4 {H/3/44} are all cases of interdependent causes. Each
 5 cause is both a "but for" and also a proximate cause of
 6 the loss. As was recognised by my Lord Lord Hamblen in
 7 *Orient-Express*.
 8 By contrast, the phrase "concurrent independent
 9 causes" is used where there are two concurrent events
 10 each of which would have been sufficient on its own to
 11 produce the entirety of the insured's loss but neither
 12 of which was necessary. Concurrent independent causes
 13 do not satisfy the "but for" test: see Lord Clarke in
 14 *The Kos* at paragraph 74 that's {E/15/298} and
 15 Mr Justice Hamblen in the *Orient-Express* at
 16 paragraph 32, that's {E/31/928}. They are not,
 17 therefore, a cause in any relevant sense of the
 18 insured's loss.
 19 There are exceptions to that, my Lords. The best
 20 known exception that might arise is where both
 21 concurrent independent causes are covered under one
 22 policy, but neither satisfies the "but for" test on
 23 account of the other, or, as you know in tort, where two
 24 people each separately shoots a bullet and each bullet
 25 kills someone. These are exceptions. That's not this

1 case.
 2 My Lord, I should mention that the FCA have come up
 3 with a new and unknown category of cause which it calls
 4 an "intermediate category of interlinked concurrent
 5 causes": see the FCA respondent's case, paragraph 346 at
 6 {B/10/439}. Now, whilst of course novelty is not
 7 something necessarily to be discouraged at law, this
 8 particular category is not known, as far as I'm aware,
 9 to the law and, dare I say it, is not very coherent in
 10 them.

11 My Lord, one applies the "but for" test and one asks
 12 the question that the court below asked: whether there's
 13 cover in respect of pandemic where it can be said the
 14 key matters which led to business interruption,
 15 et cetera, wouldn't have happened even without the
 16 occurrence of COVID-19 within the specified radius? One
 17 answers that no and that's the answer.

18 I'm not going to mention any of the cases cited by
 19 my learned friends, other than to say what they are,
 20 because neither of them is relevant Silver Cloud and
 21 McGhee, they're just not authorities of any relevant
 22 propositions to this case.

23 At the end of the day, my Lords, while the FCA might
 24 be able to prove covered notifiable disease, it cannot
 25 prove that it covered any BI loss and while it might be

1 able to prove what caused the BI loss, it can't prove
 2 that that cause was covered.

3 Now I move to the counterfactual and Orient-Express.
 4 The FCA says that even if insurers are right on the
 5 construction of the insuring clause, in other words
 6 there is a radius of 25 miles, when you get to the stage
 7 of assessing the insurers indemnity and the applying the
 8 "but for" counterfactual, whether under the trends
 9 clause or otherwise you reverse out not just the proved
 10 cases of disease within 25 miles, but disease
 11 everywhere. In other words, you reverse more than the
 12 insured peril and it says that, my Lords, in its
 13 respondent's case at paragraphs 11.4, 38, and 356 that's
 14 {B/10/338}, {B/10/347} and {B/10/441}.

15 Now, that's not right, it's not even supported by
 16 the court below. Reversing only the insured peril
 17 indemnifies the insured for loss caused by the insured
 18 peril. No more and no less. Reversing more than the
 19 insured peril impermissibly expands the scope of the
 20 insuring clause, and provides an indemnity for something
 21 that's not insured. Reversing less than the
 22 insured peril penalises the insured. The FCA's
 23 justifications just don't stand up.

24 It first asserts the inextricability of the disease
 25 within and outside the radius. I've already spoken

1 about that. Secondly, it asserts that the
 2 counterfactual must be realistic and the counterfactual
 3 which reverses disease anywhere within the 25-mile
 4 radius is unrealistic. The answer to that is given by
 5 Mr Justice Hamblen in the Orient-Express. The purpose
 6 of the counterfactual is to give effect to the indemnity
 7 principle to reverse the insured peril. There's no rule
 8 that requires it to be realistic or not artificial. In
 9 fact, the FCA's own proposal that there's no COVID-19
 10 anywhere in the UK, but exists everywhere else in the
 11 globe, is as unrealistic and artificial as they come.

12 Thirdly, the FCA repeats that it is impractical,
 13 even impossible, to assess insured's losses on the
 14 insurers' counterfactual. There's no basis for that
 15 submission, there's no evidence. In any event, it's
 16 dealt with, my Lords, at paragraph 97.4 of our
 17 appellant's case at {B/7/242} also at Hiscox appellant's
 18 case at 72 to 76. That's {B/6/174} to {B/6/176}.

19 Anyway, I don't have time to deal with all this. If
 20 there are any difficulties of quantification, they
 21 simply have to be confronted just as the arbitral panel
 22 did in the Orient-Express, confronted, as it was, with
 23 difficult questions of assessment where one had to
 24 assume that the hotel was undamaged, but the entire city
 25 was devastated.

1 I now turn to the Orient-Express. It's addressed in
 2 considerable detail, my Lords, you will find that at our
 3 case at {B/7/244} to {B/7/252} and I can do very little
 4 to improve on it but, my Lords, the facts are well
 5 known. Your Lordships should go to the case itself and
 6 I think the case is at {E/31/921}. If your Lordships
 7 will forgive me, I'm just getting it out. One second.

8 The facts are well known, my Lords. Katrina and
 9 Rita devastated New Orleans. The Windsor Court Hotel
 10 suffered significant physical damage. Its owner,
 11 Orient-Express Hotels, had insurers against direct
 12 physical loss and damage except as excluded. In other
 13 words, it had all risks physical damage cover, and it
 14 also had insurance against business interruption loss
 15 directly arising from such physical damage.

16 The essential issue in that case was how the main
 17 business interruption insuring clause should respond
 18 where the hurricanes had not only damaged the insured
 19 hotel, but had also devastated the wider area
 20 surrounding the hotel.

21 If your Lordships have that case in front of them,
 22 then you can turn to the policy and the terms at
 23 paragraphs 12 to 15. That's at page 923 {E/31/923}.

24 The principal clauses of relevance are the following:

25 "(1) The policy's insuring clause:

1 "In consideration of the Insured ... paying the
 2 premium ... the Insurers ... agree ... to indemnify the
 3 Insured:
 4 "(a) under the Material Damage and Machinery
 5 Breakdown Sections against direct physical loss
 6 destruction or damage except as excluded herein ..."
 7 ie, this is all—risks cover:
 8 "... to property as defined herein such loss
 9 destruction or damage being hereafter termed Damage."
 10 My Lords, "damage" was a defined term and it meant
 11 loss, destruction or damage which was not excluded, ie
 12 in the context of that case, it was loss, destruction or
 13 damage as caused by an included peril, namely
 14 hurricanes.
 15 Then (b):
 16 "Under the business interruption section against
 17 loss due to interruption or interference with the
 18 business directly arising from damage and is otherwise
 19 more specifically detailed herein."
 20 And (2):
 21 "The insuring clause at the head of the
 22 Business Interruption section said:
 23 "' If any property owned used or otherwise the
 24 responsibility of the Insured for the purpose of or in
 25 the course of the Business suffers Damage as

1 defined ... "
 2 Et cetera.
 3 "... and the Business be in consequence thereof
 4 interrupted or interfered with the Insurers will pay to
 5 the Insured the amount of the loss resulting from such
 6 Interruption in accordance with the provisions."
 7 Can I invite your Lordships to read the trends
 8 clause, similar to our clause and similar to the clauses
 9 in all our policies, and your Lordships will see the
 10 reference to "but for the damage" towards the end of the
 11 trends clause.
 12 When you've done that, if your Lordships could read
 13 paragraphs 13, 14, 15 and 16, you will see that there
 14 were two other clauses in the policy: the prevention of
 15 access clause and the loss of attraction clause, both of
 16 which responded to what had occurred and under which the
 17 insurer paid the required indemnity because both of
 18 those clauses are talking about property in the vicinity
 19 of the insured location, in other words the hotel, being
 20 damaged. As the learned judge said at paragraph 16:
 21 "Orient—Express Hotels has recovered an indemnity
 22 under the POA and LOA clauses, but this is subject to
 23 significantly lower limits than would be the case under
 24 the insuring clause."
 25 Now, my Lords, the insured peril for the purposes of

1 the material damage section was the fortuitous
 2 non—excluded event or cause. On the facts it was the
 3 hurricanes. If your Lordships go back to the policy at
 4 paragraph 12:
 5 "The agreement was to indemnify the insured against
 6 damage except as excluded herein."
 7 Under "business interruption", the peril was
 8 different. The peril under the business interruption
 9 section was its:
 10 "Loss due to interruption or interference of the
 11 business directly arising from damage as otherwise more
 12 specifically detailed herein."
 13 The insured peril was damage and that is also
 14 reflected, as one would expect, in the trends clause,
 15 "but for the damage."
 16 If your Lordships go to paragraph, I think, 52 of
 17 the judgment at page 931, that's {E/31/931}, to
 18 paragraph 52, in our respectful submission, the judge
 19 got it right and the court below in this case got it
 20 wrong.
 21 Sixthly:
 22 "OEH submits that the Generali's approach subverts
 23 first principles in that it involves seeking to strip
 24 out from the claim for the business interruption loss
 25 caused by insured damage, not merely the concurrent

1 consequences of extraneous circumstances, but the
 2 consequences of the very peril that caused the damage
 3 which was a proximate cause of the business interruption
 4 loss in the first place."
 5 In other words, only OEH was submitting that you
 6 have to strip out the hurricanes and all the damage
 7 caused by the hurricanes everywhere in New Orleans, and
 8 that's what you need to strip out. But the learned
 9 judge said:
 10 "However, the relevant insured peril ... "
 11 This is under BI:
 12 "... is the damage, not the cause of that damage."
 13 Similarly in our case, my Lords, we say that the
 14 relevant peril were the 25—mile radius cases of illness,
 15 not the cause of those cases of illness, not the
 16 pandemic outside.
 17 The non—excluded fortuitous cause, ie the
 18 hurricanes, were not themselves the peril under the BI
 19 section, they were the cause of the peril. They weren't
 20 irrelevant coverage, however, my Lords, they identified
 21 and defined what physical damage was insured. It had to
 22 be physical damage caused by non—excluded fortuitous
 23 causes. The perils under the property damage and under
 24 the business interruption section were not the same.
 25 The tribunal's award quoted at paragraph 17 of the

1 judgment at page 924 {E/31/924}, if your Lordships look
2 at paragraph 15, this is the tribunal of which my Lord
3 Lord Leggatt was a member:

4 "The issue arising on the construction of the policy
5 is of fundamental importance to the approach to the
6 business interruption claim, it had a major effect on
7 the nature and quality of the evidence adduced.

8 "Expressed in summary terms, the issue is this: does
9 the insuring clause of the policy provide cover, as OEH
10 submits, for any and all losses suffered by the hotel as
11 a result of the hurricanes and their effect, both on the
12 city of New Orleans and in causing damage to the hotel,
13 or does it provide cover as Generali submits only for
14 the losses caused by the damage to the hotel itself but
15 not, save for the other extensions, losses caused by
16 damage to and devastation of the city?

17 "If, for example, the consequence of the damage to
18 the city but not to the hotel was a severe shortage of
19 staff or a lack of demand for hotel accommodation, are
20 those matters which Generali can deploy?"

21 Then, my Lords, you have paragraph 17 of the award
22 there quoted. If your Lordships go to the end of
23 paragraph 18 of the award {E/31/925}, that's at
24 page 925, just above paragraph 19 of the award:

25 "The third question, in Mr Fletcher's formulation in

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1 opening submissions, was what is the loss resulting from
2 interruption?

3 "It is the first question on which the parties part
4 company. On behalf of Generali, Mr Picken QC submitted
5 that the words are clear: the cause of the loss has to
6 be and be shown by OEH to be interruption or
7 interference resulting from the physical damage to the
8 Hotel and not from the damage to the City of New Orleans
9 or, say, want of demand ..."

10 Et cetera:

11 "Mr Fletcher did not, in the view of the Tribunal,
12 ever supply a convincing answer to this submission. He
13 criticised the submission as one creating a false
14 hypothesis because the cause of the damage to the City
15 and to the Hotel was the same event or events and he
16 submitted that the policy was intended to cover losses
17 resulting from all damage caused by the events which
18 damaged the Hotel and only to exclude losses resulting
19 from damage which was completely unconnected in the
20 sense that it had an independent cause. He submitted
21 that the law relating to concurrent causes would in any
22 event enable the Hotel to recover in circumstances where
23 a given loss was caused both by Damage to the Hotel and
24 the damage to the City. And he submitted that the
25 effect of excluding the losses resulting from damage to

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1 the City was to require an artificial and hypothetical
2 enquiry to be made."

3 Very much like the submissions of the FCA in this
4 case to be made.

5 "But none of these submissions in the view of the
6 Tribunal address the language used in the provisions to
7 which we have referred and which we have emphasised.
8 The language requires OEH to establish that the cause of
9 the loss claimed is the Damage to the Hotel. It is not
10 necessary or relevant for this purpose to go behind the
11 damage and consider whether the event which caused the
12 Damage also caused damage to other property ... the fact
13 that there was other damage which resulted from the same
14 cause does not bring the consequences of such damage
15 within the scope of the cover."

16 My Lords, the tribunal goes on to say that in any
17 event the language of the trends clause is conclusive of
18 the subject.

19 Now, my Lords, that's exactly what we're doing in
20 this case. This case, the FCA case. I want to move, my
21 Lords, to, if I may, to paragraph --

22 (No audio feed provided from the court)

23 I want to move, my Lords, if I may, to paragraph 20
24 of the judgment:

25 "The occasional cases where fairness and all

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1 reasonableness require a relaxation in the standard."

2 And they referred to Kuwait.

3 My Lord Lord Hamblen emphasised that the exceptions
4 to the "but for" test are pretty exceptional.
5 Paragraph 74, he says that:

6 "This may occur where more than one wrongdoer is
7 involved. The classic example is where two persons
8 independently search for the source of the gas leak."

9 Similar, my Lords, if I could say in that case if,
10 for example, Orient-Express -- rather, the insurers in
11 Orient-Express had said, "Ah, well, you haven't suffered
12 a loss, a business interruption loss caused by damage
13 because that loss would have been sustained in any
14 event." When asked to indemnify under the POA or LOA
15 clauses, the insurers would have said or could have
16 said, "Well, you hadn't suffered a loss under those
17 clauses because those clauses would have been suffered
18 in any event as a result of damage to the hotel." The
19 insurers in that instance would have been relying upon
20 their own breach of contract in not preventing harm from
21 occurring under the competing clauses and you can't rely
22 upon your own breach of contract to avoid your
23 liability. So if they had been asked, "Please pay under
24 the damage clause, business interruption caused by
25 damage", they would have said, "Ah, well, you would have

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1 suffered loss in any event because of devastation all
 2 around the hotel". Then, if the insured had said, "Can
 3 you please indemnify in relation to the prevention of
 4 action or loss of attraction clause", the insurer
 5 couldn't have turned round and said, "Ah well, you
 6 hadn't suffered any loss under that because of the
 7 damage to the hotel, because the damage to the hotel
 8 caused you loss," the insurer would have been relying
 9 upon his own breach of contract in resisting liability
 10 under one or other of the clauses. In fact,
 11 Lord Hamblen dealt with that under the rubric of
 12 "absurdity" where he says:

13 "You can't do that because it would be absurd to
 14 allow the insurer to rely upon another clause and not
 15 pay out under that other clause.

16 My Lords, I transgress and I've got very limited
 17 time and what I need to do, my Lords, to deal with this
 18 case better is just rush a little bit and go to
 19 paragraph 29, if I could, {E/31/929}:

20 "Although OEH cannot point to any insurance or
 21 indeed contract case in which it has been held to be
 22 inappropriate for apply the 'but for' test, it applies
 23 on the generally accepted principle that where there are
 24 two proximate causes of loss and insured can recover on
 25 the basis that it is sufficient that one of the causes

1 of the peril insured provided the other cause was not
 2 excluded: see The Miss Jay Jay. Whilst to date this has
 3 been a principle applied in respect of concurrent
 4 interdependent causes, OEH submits that it should be
 5 equally applied to concurrent independent causes."

6 My Lord, it wasn't and rightly so, my Lords. Those
 7 cases are not cases where one can recover because they
 8 are concurrent independent causes.

9 And if your Lordships go to the next paragraph which
 10 I need to take your Lordships to is -- if your Lordships
 11 could turn to paragraph 38 {E/31/929} where the learned
 12 judge dealt with the fairness and reasonableness, and
 13 this is important:

14 "Thirdly, in any event I am not satisfied that it
 15 has been shown that 'fairness and reasonableness' does
 16 require that the 'but for' test should not be applied.
 17 The tribunal, in accordance with the Trends clause, has
 18 adopted a 'but for' the damage to the hotel causation
 19 test as the basis of assessing the recoverable losses.
 20 If such a test is not adopted what is the alternative?
 21 One possibility would be 'but for the damage to the
 22 Hotel and the City' -- ie an 'undamaged Hotel in
 23 an undamaged City' scenario. However, that would
 24 measure the gross operating profit which would have been
 25 made by OEH if the hurricanes had not struck at all and

1 would therefore compensate OEH for all
 2 business interruption losses howsoever caused, even
 3 where those losses were not in any way caused by damage
 4 (and as such are not recoverable under the main insuring
 5 clause of the policy)."

6 And that's exactly the answer to the FCA's case in
 7 this matter. It's not "but for" the 25-mile radius
 8 cases and COVID-19 everywhere else, which is what the
 9 FCA would like to say through some theory of
 10 indivisibility or proximate cause; it is "but for" the
 11 25-mile radius cases. It's not "but for" the 25-mile
 12 radius cases and the cause of those cases, namely the
 13 epidemic or the pandemic even extending to China. It is
 14 "but for" the 25-mile radius cases. You don't add
 15 anything in to that insured peril in order to expand the
 16 scope and extent of the indemnity.

17 So, my Lords, that is the effect of that case. And
 18 if your Lordships would go to paragraph 46 {E/31/930}
 19 this is the wording of the clause, the trends clause:

20 "As to the wording of the clause, OEH submits that,
 21 even on a literal approach to the words 'had the Damage
 22 not occurred' or 'but for the Damage' ...
 23 Hurricanes Katrina and Rita ... could not have occurred
 24 either."

25 Now:

1 "... Hurricanes Katrina and Rita (which caused the
 2 damage) could not have occurred either. One cannot
 3 ignore the damage and yet pretend, for the purposes of
 4 the Trends clause, that the event which caused the
 5 damage still happened. However, this does not follow.
 6 The only assumption required by the clause is that the
 7 damage has not occurred. It doesn't require any
 8 assumption to be made as to the causes of the damage."

9 And then it says:

10 "Secondly, OEH submits that the Trends clause is
 11 dealing with the effect of real 'trends, variations or
 12 special circumstances' which either did affect the
 13 business or which would have affected the business, had
 14 the damage not occurred. It is dealing with the
 15 implications of actual events, not imaginary or
 16 hypothetical ones. The only permitted counterfactual is
 17 to assume that there was no insured damage and to ask
 18 what consequences these actual trends, variations or
 19 circumstances would have had. A hypothetical Rita or
 20 Katrina ... is not a 'special circumstance' which would
 21 have affected the business had there been no damage but
 22 an entirely fictional event."

23 Those were the submissions of the hotel:

24 "However, the clause requires a single assumption to
 25 be made (that there was no damage), and for the actual

1 facts to be considered on the basis of that assumption.
 2 That is what the tribunal have done."
 3 Similarly, in our case. It doesn't matter how
 4 difficult it is, which it isn't. It doesn't matter how
 5 difficult it is, one reverses with a counterfactual all
 6 of the insured peril, but no more than the
 7 insured peril. There is a single assumption to be made,
 8 which is that there are no COVID-19 cases within
 9 25 miles of the premises. That's not an artificial
 10 assumption. The Scilly Isles survived for months
 11 without a COVID-19 case. Bits of Northumbria didn't
 12 have any COVID-19 cases at the beginning.
 13 "Thirdly", it says, paragraph 48:
 14 "... OEH submits that the opening part of the Trends
 15 clause required adjustments to be made for 'the trend of
 16 the Business ... [et cetera] ... these words are looking
 17 at trends, variations or circumstances independent of
 18 the (insured) Damage."
 19 This is just the same as the FCA's case:
 20 "However, the trends, variations and circumstances
 21 considered by the Tribunal were independent of the
 22 insured Damage, albeit not independent of the cause of
 23 that Damage."
 24 Similarly in our case. You look at trends and
 25 circumstances independent of the 25-mile cases but not

1 independent of the cause of those 25-mile cases.
 2 Quite simply, my Lords, if in that case the insured
 3 had wanted business interruption cover from hurricanes,
 4 it could have asked for business interruption cover from
 5 hurricanes. In other words, business interruption
 6 losses caused by hurricanes. That's not what it asked
 7 for and that's not what it got. It got
 8 business interruption loss indemnity from damage, and
 9 that was all. Similarly, in our case.
 10 If I could take your Lordships to -- I've taken
 11 your Lordships to paragraph 52, where we've got the
 12 insured peril, and then I want to go to 57 and 58 and
 13 then you'll be pleased to know that I have to be quiet
 14 otherwise I will be garrotted by my fellow insurers.
 15 57, at page 931 {E/31/931}:
 16 "I agree with the tribunal that the clause [that's
 17 the trends clause] is concerned only with the damage,
 18 not with the causes of the damage. What is covered are
 19 business interruption losses caused by damage, not
 20 business interruption losses caused by damage or 'other
 21 damage which resulted from the same cause'. Nowhere in
 22 the Trends clause does it state that 'variations or
 23 special circumstances affecting the Business either
 24 before or after the Damage or which would have affected
 25 the Business had the Damage not occurred' has to be

1 something completely unconnected with the damage in the
 2 sense that it had an independent cause to the cause of
 3 the damage. The assumption required to be made under
 4 the Trends clause is 'had the Damage not occurred'; not
 5 'had the Damage and whatever event caused the Damage not
 6 occurred'.
 7 So at 58 {E/31/932}, the learned judge says:
 8 "I agree with Generali that OEH's construction
 9 effectively requires words to be read into the clause or
 10 for it to be re-drafted."
 11 And then the last few lines:
 12 "... [that] is inconsistent with the causation
 13 requirement of the main insuring clause which OEH
 14 accepts requires proof that the losses claimed were
 15 caused by damage to the hotel."
 16 Now, translating that into our case -- I've already
 17 made the submission and then I'll be quiet. Translating
 18 that into our case, my Lords, that was a case of wide
 19 area damage. Our case is a case of wide area disease.
 20 That was a case of specific damage to a hotel. Our case
 21 is a case of supposed 25-mile COVID-19 cases. The only
 22 peril insured against in our case are COVID-19 cases
 23 within 25 miles. That's the only peril. If these
 24 insureds had wanted pandemic cover or epidemic cover on
 25 a national scale, then they didn't get it. And perhaps

1 they could have if they'd asked, I know not, but they
 2 didn't get it.
 3 And what the court below has done and what the FCA
 4 seeks to achieve is that the business interruption
 5 losses which were caused by the national pandemic should
 6 be recoverable by the insured, even though the
 7 insured peril was confined to COVID-19 cases within
 8 25 miles of the premises. That was the deal that was
 9 made and that's the bargain which has to be enforced by
 10 this court. As soon as you start messing around with
 11 things outside that perimeter or boundary, you are
 12 reverse engineering the contract of insurance, dare
 13 I say it, and you may be unduly -- and I'm sure you
 14 won't be -- influenced by the circumstances that we are
 15 considering this issue in the light of what has occurred
 16 over the last six to nine months. Whereas if you'd been
 17 asked this question a year ago, dare I say it, you would
 18 have had no hesitation in saying this is a case where
 19 the insured peril is 25-mile radius cases. Had those
 20 caused business interruption losses? The fact that
 21 there is some disease outside is an irrelevance. You
 22 can't reverse engineer those cases either through
 23 construction or through causation into the
 24 insured peril. No, FCA or insureds, we're awfully sorry
 25 but no.

1 And those, my Lords, are our submissions. I'm sorry
 2 to have shouted at you rather a lot recently.
 3 LORD REED: Thank you very much, Mr Kealey.
 4 We still have another quarter of an hour and so
 5 we'll turn next to counsel for Royal & Sun Alliance,
 6 Mr David Turner QC.
 7 Submissions by MR TURNER
 8 MR TURNER: My Lords, as you know, RSA brings an appeal in
 9 respect of two of the policies which were under
 10 consideration at first instance. Taking them in the
 11 order in which I'm going to deal with them, the first is
 12 the Cottagesure policy known as RSA1, and that's
 13 a policy which is specifically designed for the owners
 14 of holiday cottages. That policy includes a hybrid
 15 clause with a 25-mile radius disease provision. I was
 16 going to deal with it second because it's a hybrid
 17 clause but, given the time, it's better to take it first
 18 because I will be shorter on RSA1.
 19 On RSA3, the Eaton Gate commercial combined policy,
 20 that is a policy which contains amongst other clauses
 21 a 25-mile radius disease clause, as well as an exclusion
 22 we say in respect of epidemic.
 23 In terms of the points I'm going to make beyond
 24 preliminary points, I'll deal, as I've indicated, with
 25 RSA1 before RSA3.

1 Just in relation to causation, I should say that
 2 I adopt Mr Kealey's submissions in relation to "but for"
 3 causation and counterfactuals and the Orient-Express,
 4 and I adopt whatever Mr Crane and Mr Salzedo before him
 5 said in relation to causation.
 6 I also adopt the submissions of Mr Crane and
 7 Mr Salzedo in relation to radius provisions generally,
 8 and I adopt prospectively Mr Lockety's submissions in
 9 relation to pre-trigger losses. I also adopt the
 10 submissions of those who have gone before in relation to
 11 the significance of the words "interruption or
 12 interference" in the context of the insured peril,
 13 adopting, if I may, also the approach taken by my Lord
 14 Lord Hamblen in the Orient-Express case, where those
 15 words were not seen to be integral to the insured peril
 16 but simply descriptive generally.
 17 One further point on causation, you've been taken to
 18 paragraphs 111 and 112 which deal with indivisibility
 19 and each occurrence being an effective cause of the
 20 national restrictions. Can I just draw your attention
 21 to paragraph 418 of the judgment {C/3/149}. It's in the
 22 context of one of Hiscox's wordings, but this is where
 23 the Divisional Court seems to have provided a ruling
 24 which directly contradicted that which it had reached at
 25 paragraph 112 {C/3/69}, because in paragraph 418 the

1 Divisional Court said:
 2 " ... it cannot be said that any such localised
 3 incident of the disease ... "
 4 That's an incidence of disease at that point within
 5 a one-mile radius:
 6 "... caused the imposition by the government of the
 7 [national] restrictions ."
 8 And we say that that is correct and the approach
 9 that should have been adopted in relation to the other
 10 policies .
 11 In relation to RSA1, by way of summary, this is
 12 a policy which provides disease cover only as an adjunct
 13 to primary business interruption cover, which itself is
 14 parasitic on insured material damage to the insured's
 15 property. The policy only responds to the consequences
 16 of a notifiable disease either at the premises or within
 17 the specified radius of the premises. Disease outside
 18 the specified radius is not part of the insured peril .
 19 This policy does not include a trends clause, but it
 20 does include quantification machinery in the form of
 21 a definition which I will take you to and the
 22 consequence is that the insured peril must be the sole
 23 cause of the loss .
 24 Can I take you, then, to the relevant policy terms,
 25 and they are to be found in {C/15/1114}, starting at

1 page 1114. My Lords, they are summarised in our written
 2 case, which I should also have said I adopted, {B/9/29},
 3 and the summary starts in appendix A at page 322 of
 4 bundle B {B/9/322}.
 5 There is a one-document provision of the sort that
 6 Mr Kealey took you to in relation to his wordings which
 7 can be found on page 1118 {C/15/1118} of the policy.
 8 It's the third paragraph down. So everything to be
 9 construed as one document. The following page
 10 {C/15/1119} sees the start of the proxy damage section.
 11 Business interruption insurance, the section starts
 12 at page 1125 {C/15/1125} and the insurance, the BI
 13 insurance, only applies where it is shown as included in
 14 the schedule.
 15 Can I take you then to the schedule. And if we go
 16 to that at page 1195 {C/15/1195}, the schedule itself
 17 starts at page 1194 {C/15/1194}.
 18 At {C/15/1195}, in respect of business interruption
 19 insurance, what is insured is loss of gross revenue. and
 20 "Loss of Gross Revenue" is itself a defined term and we
 21 see the definition for that at page {C/15/1186}. It's
 22 on the left -hand side of page 1186. It's:
 23 "The actual amount of the reduction in the Gross
 24 Revenue received by You during the Indemnity Period
 25 solely as a result of Damage to Buildings."

1 So this is the provision I was referring to which
 2 the learned judges said was part of the quantification
 3 machinery and so I can knock this point on the head.
 4 In their judgment at paragraph 297, which is in
 5 {C/3/119}, what they said is that:
 6 "... the contractual confiscation machinery
 7 including the definition of Loss of Gross Revenue is
 8 intended to be applicable to heads of cover which do not
 9 involve physical damage and are to be read accordingly."
 10 So, in other words, it was exactly the same
 11 manipulation of contractual language that they made in
 12 respect of the trends clauses where the trends clauses
 13 provided for physical damage, and no distinction to be
 14 made about the manipulation of language. And no point
 15 arises on this appeal that that manipulation should not
 16 be made in the context of RSA1 or, indeed, in respect of
 17 any of the other wordings that your Lordships are
 18 considering.
 19 The business interruption insuring clause back in
 20 {C/15/1135}, in the right-hand column comes under
 21 a heading that would normally indicate that's what being
 22 discussed is a basis of settlement clause, but in fact
 23 the heading itself is not particularly helpful because
 24 it's clearly setting out the insuring provision on the
 25 right-hand side:

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1 "If Damage by any Event covered under this Insurance
 2 occurs ..." et cetera "... and causes interruption ...
 3 We will pay ... the amount of loss resulting from the
 4 interruption or interference caused by the Damage ..."
 5 There is, as you would expect, a material damage
 6 proviso which one finds on the following page
 7 {C/15/1136} in the right-hand column under the heading
 8 "Material Damage Requirement".
 9 The key extensions are to be found at
 10 page {C/15/1129}, so back in time. "Extensions to
 11 cover":
 12 "This insurance also covers ...
 13 1 Failure of public supply ..."
 14 So that's failure of supply effectively to the
 15 premises.
 16 2 is the disease murder, suicide, vermin and pests
 17 provision which is in terms that you will have
 18 encountered in the other policies that you have already
 19 seen. So:
 20 "Loss as a result of.
 21 "A) closure or restrictions placed on the Premises
 22 as a result of notifiable human disease manifesting
 23 itself at the Premises or within a radius of 25 miles of
 24 the Premises."
 25 And then a series of other clauses, which by now

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1 will be familiar to you: injury or illness ; closure of
 2 the whole or part of the premises by order of the public
 3 authority as a result of defects in drains or sanitary
 4 arrangements; murder, rape or suicide at the premises;
 5 closure or restrictions on the premises as a result of
 6 vermin and pests at the premises.
 7 Damage, as you would expect, is defined in the
 8 normal terms. I will just give you the reference. It's
 9 {C/15/1184}. I will not ask you to turn it up, but
 10 it's:
 11 "Accidental loss, destruction or damage."
 12 So dealing very quickly, if I may, with the scope of
 13 the peril, at (inaudible).
 14 (3.57 pm)
 15 (No audio feed provided from the court)
 16 (4.01 pm)
 17 (The court adjourned until 10.30 am
 18 on Tuesday, 17 November 2020)
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