

BUSINESS INTERRUPTION INSURANCE TEST CASE

DRAFT TRANSCRIPT

OF DAY 4 OF SUPREME COURT APPEAL (19 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 SC4

November 19, 2020

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Phone: +44 (0)20 3008 5900

Email: transcripts@opus2.com

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

1 Thursday, 19 November 2020
 2 (10.30 am)
 3 Submissions by MR EDELMAN (continued)
 4 LORD REED: Welcome to the Supreme Court of the
 5 United Kingdom, where we are beginning the fourth and
 6 final day of the hearing of the appeals in the
 7 proceedings brought by the Financial Conduct Authority
 8 against a number of insurance companies. The
 9 proceedings are concerned with the extent, if any, of
 10 the liability of the insurance companies under
 11 business interruption policies to policyholders whose
 12 businesses were affected by the COVID pandemic.

13 We're being addressed at the moment by counsel for
 14 the Financial Conduct Authority, Mr Edelman, and I will
 15 turn now to him.

16 Mr Edelman.

17 MR EDELMAN: Good morning, my Lords. My Lords, there's
 18 a key point on the clauses that require something like
 19 prevention of access or inability to use, sometimes it
 20 is expressed slightly differently but if I can treat
 21 those two categories compendiously and that key point
 22 is: are they intended to require a total prevention of
 23 access or inability to use for pre-existing activities
 24 or is some partial prevention or inability to use
 25 sufficient?

1

1 I was giving you at the end of yesterday the example
 2 of the restaurant with the access to the restaurant
 3 itself blocked. We can assume in this case physically
 4 blocked, although it's accepted by insurers that
 5 physical prevention is not required, but with the access
 6 to the rear leading to its kitchen making that usable by
 7 kitchen staff, and so it was possible therefore to do
 8 takeaway meals and take them to the road for collection
 9 by a driver who could deliver the meals.

10 The restaurant for this purpose we assume hires
 11 drivers or enters into a contract with one of the
 12 delivery services to tide itself over.

13 The answer that insurers give, they say if there was
 14 no pre-existing takeaway business, there is both
 15 a prevention of access and an inability to use because
 16 those must be applied to the existing activities at the
 17 time of the event.

18 If there was a pre-existing takeaway business, there
 19 is no prevention of access at all or inability to use at
 20 all because the continuation of that takeaway activity
 21 was possible. Nor could the restaurant recover the
 22 increased cost of working in respect of its additional
 23 delivery costs aimed at mitigating its loss suffered
 24 from the physical prevention of access to its restaurant
 25 which meant that its restaurant area and therefore

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1 restaurant activity had to be closed. That in
 2 a nutshell is, as we understand it, the insurers' case
 3 and that's why I said to my Lord Lord Hamblen yesterday
 4 that there is some overlap on some aspects of our case,
 5 but on this it's an all-or-nothing. There is actually
 6 a case of a café in Belfast that has, as far as
 7 I understand it, been refused indemnity because they
 8 used to sell cakes to passers-by from a counter at the
 9 front of the café, and maybe hot drinks as well, I don't
 10 know, but the main business of the café had to close but
 11 because they may be running the café, could still sell
 12 the cakes and maybe some hot drinks, there was no
 13 inability to use and no prevention of access. People
 14 like that are being refused any indemnity at all, even
 15 though nobody can go in -- if the counter's at the
 16 front, nobody is allowed to go into the rear part to go
 17 and sit at the seats.

18 Our submission is that these policies have to be
 19 construed and applied in a practical and purposive way
 20 and it really does stretch credulity to say that, in the
 21 two examples I have given, there is no prevention of
 22 access or inability to use in such cases. If the
 23 restaurant was to describe its activities in a proposal
 24 form or in a schedule to the policy, it might well put
 25 "Restaurant and takeaway" and for one of those

3

1 activities it's unable to use its premises for. It
 2 can't use the premises for the restaurant and there is a
 3 prevention of access to the restaurant. For anyone
 4 wanting to dine in, they can't come and dine in the
 5 restaurant.

6 We would say that, looking at that sensibly, one
 7 looks not just at all of the purposes, so that if you
 8 can still do one of them, there's no inability to use or
 9 prevention of access at all, one simply says "Well,
 10 there was an inability to use or prevention of access
 11 for that activity". And that, we submit, should be the
 12 answer to those categories of case. It's suggested in
 13 relation to the prevention of access cases that we've
 14 confused prevention with hindrance.

15 We say that hindrance is a different concept and
 16 there's no conflict in our approach. Hindrance involves
 17 the idea of something being made more difficult. But
 18 cover against hindrance would cover a situation, for
 19 example, where a road closure meant that a long detour
 20 was necessary for people to access the premises which
 21 would deter people from coming there.

22 Prevention, whether partial or total, is not about
 23 making things more difficult about whether or for what
 24 purposes people are allowed to go to or enter the
 25 premises, and the same point applies to inability to

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1 use.
 2 Now before I turn to the policies, can also make
 3 some points about particular categories of business
 4 because there was some criticism of the fact that we
 5 didn't address in our appeal case how regulation 6 on
 6 movement of the public affected categories 3 and 5. We
 7 didn't address that in our appeal case. Just to remind
 8 you, category 3 includes food retailers, pharmacists and
 9 other things like hardware stores, and category 5 is
 10 businesses not mentioned in the 21 March Regulations or
 11 the 26 March Regulations and that would include
 12 professional firms, accountants, lawyers, estate agents
 13 and construction and manufacturing businesses.

14 Now, category 3, we say they are unable to use their
 15 premises for their normal activities or their ordinary
 16 purposes and there was a prevention of access because on
 17 16 March customers were told to stop unnecessary travel
 18 and stop non-essential contact with others.
 19 Regulation 6, later on, 23 March, customers were told
 20 only to shop for basic necessities. The prevention of
 21 access is like our example of a road closed save for
 22 residents or their visitors. In other words, you can
 23 only go to these shops for particular purposes. That's
 24 so you can only use this road if you're a resident or
 25 you're visiting a resident, otherwise you cannot go

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1 there, you're not allowed to under the 16 March
 2 announcement, saying that's what you ought not to do.

3 Category 5, taking the professional services,
 4 generally they would be able to work from home. There
 5 would be no reasonable excuse to go to work if you can
 6 set yourself up at home, and so on that basis you are
 7 unable to justify going to your business premises and
 8 therefore unable to use them and you are prevented from
 9 accessing them, and that would apply from the 16 March
 10 announcement onwards but obviously would include
 11 regulation 6.

12 We do, in fact, deal with it in our respondent's
 13 case in relation to some points made by Hiscox on their
 14 policy, which Mr Gaisman didn't develop orally because
 15 of lack of time. Had he developed them orally, I might
 16 have responded orally and dealt with this in response to
 17 him, but the relevant passages in our submissions, our
 18 response case, are paragraph 503 {B/10/497} and
 19 paragraphs 516.1 and 516.2 at {B/10/502}.

20 I'm not asking you to look at those now, but you'll
 21 see that we give some examples there of how it would all
 22 work.

23 Finally, I should mention category 4, non-essential
 24 shops. It's the same point about restrictions on the
 25 public generally. But in particular regulation 5(1)(c)

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1 required those premises to cease to admit any person to
 2 the premises not required to carry on its business or
 3 provide its services, essentially remote sales. So if
 4 you were a shop, you had to close your doors to
 5 customers but your staff could continue to work on
 6 remote sales if that's what you were doing before or if
 7 that's what you wanted to start doing. If that's what
 8 you wanted to start doing, there is a prevention of
 9 access or inability to use, but if you were doing some
 10 of that before then there is no prevention of access, no
 11 inability to use according to insurers. We say that
 12 devise a common-sense construction and application of
 13 these policies, and undermines their commercial purpose.

14 So, my Lords, if I can now move on to the Arch
 15 policies. Just to mention that I have until
 16 11.17 because we're splitting the five-minute break
 17 between the parties and then Mr Lynch will have his 40
 18 minutes. With hard negotiation, I think I may have lost
 19 30 seconds, but so be it. I've probably just wasted it
 20 by telling you that.

21 The Arch policy, we can probably take it now quite
 22 quickly. The intention of taking some points generally
 23 was to avoid repetition when I got to the policies. If
 24 we go back to bundle {C/4/227}, the prevention of access
 25 clause, the judges below dealt with this in the judgment

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1 at 324 to 326 {C/3/125}. They are long passages, I hope
 2 you've read them; I'm not going to reread them.

3 Just to pick up some of the points that are made in
 4 response, if you go back to the previous page, reliance
 5 is placed on extension 1 "Hinders or prevents access"
 6 and it's said, well, if it meant "hindered access" it
 7 would have said so. For the reasons I've given, that
 8 misses the point. I'm not trying to turn hindrance into
 9 prevention, it is something different, but partial
 10 prevention is not hindrance, it's partial prevention.

11 Reliance is also placed on the disease extension 3
 12 under "Disease" on page 226 still and at the foot of
 13 that extension, which it doesn't apply because there's
 14 defined diseases, if you want to go back to 224, you'll
 15 see this is one of those examples where they listed the
 16 diseases that the policy should apply to, just if you're
 17 interested, but it's not on this point.

18 Going back to 226 {C/4/226}, it's said, well, this
 19 talks about use of the premises being restricted and if
 20 in the extension we're concerned with, number 7, on
 21 page 227 {C/4/227}, if it had meant "use", it would have
 22 said it, but it says "prevention of access". I agree,
 23 that's why we've focused our submissions on whether
 24 people are allowed to go to the premises and whether,
 25 after regulation 5, the shop was allowed to let people

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1 in. The answer was it could only let in those people
 2 who were working there in order to work on remote sales,
 3 it couldn't let in customers. That was a prevention of
 4 access to customers.
 5 It may also have been the fact that there was an
 6 inability to use the premises for in-store sales but it
 7 is also prevention of access.
 8 But one point that does support our submissions, and
 9 that is -- although I don't place enormous weight on it
 10 but it's a factor -- at page 226 {C/4/226}, going back
 11 to that, the preamble. We have reference to reduction
 12 in turnover and increasing cost of working. And if you
 13 go to the definition of "turnover" on 225 {C/4/225}
 14 it's:
 15 "Money paid or payable to You ..."
 16 In the top left-hand corner:
 17 "... in the course of The Business at The Premises."
 18 And we've got the definition of gross profit:
 19 "... indemnify You in respect of any interruption or
 20 interference with The Business as a result of Damage
 21 occurring during the Period of Insurance."
 22 "Basis of settlement" on the next column:
 23 "Insurance of Gross Profit is limited to loss due to
 24 "Reduction in turnover, and
 25 "Increase in cost of working."

1 But it seems to be the case from Arch's perspective
 2 that when it comes to this prevention of access clause,
 3 unless your increasing cost of working is incurred after
 4 the prevention of access has ceased, perhaps, or in
 5 order to start up a new activity, you don't get
 6 indemnity -- this simply doesn't apply to a business in
 7 my example -- remember, I gave the example of hiring
 8 extra drivers or engaging the service of a delivery
 9 company at increased cost in order to reduce your loss
 10 of turnover resulting from the closure of your
 11 restaurant? That is not recoverable as an increased
 12 cost of working. And, again, we say that doesn't make
 13 sense of what a policy appears to be conferring on the
 14 insured as a benefit.
 15 Similarly, it's said because in relation to office
 16 staff, because people could go -- the IT staff could go
 17 in and you could have your printing department going,
 18 there wasn't a prevention of access. But those are --
 19 and it is accepted that those are peripheral activities.
 20 Those are not fee-earning activities. But if you hired
 21 more IT staff, as so many people have done, so that the
 22 fee earners, the business itself, the profit-earning
 23 element of it could continue with all the fee earners
 24 working at home, that is not an increased cost of
 25 working because the fact that people from IT can go in

1 there to look after your server and make sure everything
 2 is working just demonstrates the case. As I understand
 3 what insurers are saying, it demonstrates the fact that
 4 access is not prevented.
 5 That is what I wanted to say about the Arch policy.
 6 I should perhaps, before I go from that one, show you
 7 a passage in the judgment at 310 where a concession is
 8 made, paragraph 122. Sorry, it's page 122,
 9 paragraph 310 {C/3/122}. Bundle C, of course.
 10 You'll see the concession there recorded. It's just
 11 at the end of the third line:
 12 "Arch also accepts that, where the effect of the
 13 actions or advice was that businesses had to close or
 14 cease business, there was a prevention of access, in
 15 other words, it was not necessary that access be
 16 physically impossible or obstructed."
 17 Then the next sentence down:
 18 "Arch accepts that there was prevention of access to
 19 businesses in Category 2... in relation to... Category 1
 20 which did not previously provide takeaway services,
 21 access was prevented because they could not be opened to
 22 customers without the policyholder making a fundamental
 23 change to the nature of the business."
 24 That was the limit of the concession. That's where
 25 I got if there's an existing takeaway, then you lose.

1 Sorry, there's one further point I should have made
 2 about Arch's case. They've said that the extension
 3 requires the prevention of access to be directed at the
 4 means of accessing the premises. So although he says
 5 it's not about physical access, they do take a point
 6 that restrictions on the free movement of people
 7 generally is not a prevention of access, but we submit
 8 that's not what the provision says. It just requires
 9 that the actions or advice of the government have the
 10 causal consequence due to -- have the causal -- going
 11 back to page 227 {C/4/227}:
 12 "The prevention of access ... [must simply be] due
 13 to the actions or advice of a government ..."
 14 And that causal connection is satisfied if the
 15 effect of the government action or advice is to prevent
 16 people from going to the premises, whether it's to
 17 a shop, a restaurant or a professional person going to
 18 his or her office.
 19 So, my Lords, I move forward to Hiscox and Hiscox 2,
 20 and grounds 2 and 3 we have on this one. Can I just
 21 show you, perhaps, Hiscox 2 at tab 7 in bundle C,
 22 page 430 {C/7/430}. And you'll see that the restriction
 23 is:
 24 "... ability to use ... due to restrictions
 25 imposed ..."

1 I've made my submissions about restrictions imposed.
 2 Question whether "imposed" requires legal force. We say
 3 not. "Imposed" is what the government was seeking to do
 4 in its announcements, but we debated that yesterday.
 5 The question that I want to address is inability to
 6 use and I've again made some submissions about that, but
 7 just a particular example. Because we're on inability
 8 to use as opposed to prevention of access, let's say
 9 that, because of a problem with drains or sanitation,
 10 the owner of a two-storey department store decided that
 11 it wasn't going to be possible to have customers in the
 12 ground floor but they could still use the second floor,
 13 and so people could still go and shop on the second
 14 floor.
 15 Accordingly to Hiscox, there is no inability to use
 16 at all because you can still use the second floor even
 17 though they would have no quibble with the fact that
 18 there is actually an inability to use the first floor.
 19 They say it's not a qualifying inability to use because
 20 you have to be unable to use the premises in its
 21 entirety. Hence, when we come to use my case about the
 22 lady running the small café, because she could still use
 23 the front part of her shop to sell cakes and maybe the
 24 odd hot drink, there was no inability to use even though
 25 all of the property to the rear she was unable to use it

1 because she was not allowed to serve in there and people
 2 weren't allowed to come in.
 3 If we look at some of the elements in the clauses.
 4 Firstly, if we go to page 430 {C/7/430} you will see
 5 that this also has "Increased cost of working" and it
 6 also at the foot of the page has "Uninsured working
 7 expenses" and you'll see one of the uninsured working
 8 expenses is rent. And if you go to the definition of
 9 the word "Rent", you'll see it's defined as:
 10 "Rent:
 11 For the salon that you must legally pay whilst the
 12 salon or any part of it is unusable as a result of
 13 insured damage or restriction."
 14 In this form of policy, the only clause that imposes
 15 a restriction on page 431 {C/7/431} is the public
 16 authority clause, "inability to use". We submit that
 17 that demonstrates that Hiscox contemplated and the
 18 policy contemplates part of the premises being unusable,
 19 which we say is right, albeit not the sole extent of the
 20 inability to use. This one is a very simple policy but
 21 there are others.
 22 One point is made when we relied on the additional
 23 costs of working. It's said that this during the
 24 indemnity period and, as I've said, the indemnity period
 25 could extend beyond the lifting of the restrictions but

1 the indemnity period, you'll note on page 430 {C/7/430}
 2 starts with the date the restriction is imposed. So
 3 there is no reason to conclude that increased cost of
 4 working only applies after the restriction ceases to be
 5 imposed and it would be counter-intuitive for it to do
 6 so because it's saying to the insured "Don't worry, if
 7 you mitigate your loss, we will pay for your costs in
 8 doing so" and it defies belief, we submit, to say that
 9 if an insured incurs costs to diminish its loss, that
 10 actually could result in it losing cover, but in any
 11 event it's not covered for it in circumstances where it
 12 is unable to use part of its premises and incurs costs
 13 to reduce the loss as a result of doing so.
 14 One can also see that in other forms of the policy,
 15 and I think there's this in Hiscox1, page 400 {C/6/400}.
 16 There is a reference to "Bomb threat" and that's about
 17 in the middle of the page, an extension for bomb threat,
 18 and you'll see that that refers to "total inability to
 19 access", "total access is denied". And so we submit
 20 that that is an indication that the draftsman of these
 21 sets of clauses — and I know I've just shown you two
 22 separate policies — but you'll see from all the
 23 different policies that there are sets of words that
 24 Hiscox uses and one is entitled, in my submission, to
 25 form a judgment as to what an insurer intends as to the

1 operation of its policies from viewing its suite of
 2 clauses and that is how this all fits in.
 3 It also, if we go back to page 431 {C/7/431}, if you
 4 look at the "Loss of income" at the first item under
 5 "How much we will pay" in the bottom quarter of the
 6 page:
 7 "Loss of income
 8 "the difference between your actual income during
 9 the indemnity period and the income it is estimated you
 10 would have earned."
 11 Which again is consistent, certainly not
 12 inconsistent, with the contemplation that, despite the
 13 inability to use, there may be some income still being
 14 generated.
 15 You'll also be aware that the court construed
 16 "interruption", still on page 431 {C/7/431} at the top of
 17 the page as encompassing interference and as covering
 18 the normal range of things that a business interruption
 19 policy would cover. Hiscox appeal against that, but on
 20 the basis of the judgment that's broad, but on the basis
 21 of the approach to inability to use, it would only apply
 22 to the most extreme interruption, complete cessation,
 23 and would not be consistent with the more general
 24 meaning of that word that the courts gave to it.
 25 Yes, my Lord.

1 LORD LEGGATT: Sorry to interrupt you, Mr Edelman, I just
 2 wanted to mention now that I have some questions I would
 3 like to ask before you finish about wide area damage
 4 again, so I'm just inviting you, if you wouldn't mind,
 5 to leave a few minutes at the end.

6 MR EDELMAN: I will. Certainly, my Lord, yes, yes.
 7 I'm trying to take this quite quickly because it is
 8 fairly fully set out in our case, but I'm just trying to
 9 meet some points that have been addressed. I think
 10 we've dealt with the "your activities /your business"
 11 point. It's said by Hiscox specifically — and this is
 12 paragraph 107 of their response to our appeal
 13 {B/14/580}:

14 " ... if an insured adapts after a period of being
 15 unable to use ... it will be able to claim for both the
 16 period of inability and the increased cost of working
 17 within ... [that] period."

18 But it simply doesn't address the argument that if
 19 there was the ability to adapt to use the premises in
 20 a way which makes it possible to carry on the basis in
 21 a fundamentally different way, the ability to use must
 22 be looking at some particular pre-peril activity and
 23 that means that the premises were still able to be used.
 24 By definition, if you can adapt to use it for something
 25 else, you were able to use the premises. So there is

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1 an inconsistency in the argument in saying we're not
 2 saying you ceased to be unable to use it if you can use
 3 it for something new, well, if you can use it for
 4 something new, why should it be an inability to use if
 5 you continue to use it for one of two purposes that you
 6 were using it before but not the other?

7 My Lords, RSA1 which is at page 1129 {C/15/1129},
 8 it's:

9 "Closure or restrictions placed on the Premises as
 10 a result of a notifiable human disease ..."

11 "Closure or restrictions placed ..." And it's
 12 a question there whether indirect measures suffice. And
 13 we say the correct reading of this is "closure of or
 14 restrictions placed on the premises" and that is in fact
 15 how the court read it. You'll see at paragraph 294
 16 {C/3/118}, but we submit that on this one that if there
 17 is a closure of the premises that that, as we've said in
 18 our case, that that can be a closure which is — all it
 19 has to be is caused by. So what you're asking is has
 20 there been a closure of the premises as a result of,
 21 accepting that there has to be some sort of reason
 22 associated with the disease for the closure, but
 23 a closure either because people are not coming to the
 24 business any more or because people are not allowed to
 25 come to the business any more would be sufficient.

18

1 So even if there were premises that weren't ordered
 2 to close, if they had to close because of the
 3 circumstances, then that would be covered.

4 My Lords, the remaining policies to address are all
 5 policies where either we succeeded on other grounds in
 6 relation to RSA4 and Amlin 1 and Hiscox or we've failed
 7 but what we are doing is testing, because this is a test
 8 case asking for a particular declaration, if it's going
 9 to be altered to be altered consistently.

10 So I would rather answer my Lord Lord Leggatt's
 11 question than deal with those which are less significant
 12 points.

13 LORD LEGGATT: Yes, thank you, Mr Edelman. I've just been
 14 reflecting about the wide area damage problem that you
 15 addressed us on early on and Orient-Express Hotels and
 16 I've just been wondering whether perhaps there are two
 17 different aspects or questions which may at some points
 18 have been conflated but which need to be kept distinct.

19 The first is illustrated by the case where the hotel
 20 is badly damaged, so is the surrounding area. The hotel
 21 has to close for two weeks, but even if it had been open
 22 nobody would have come to the hotel because they
 23 couldn't access it and the surrounding area was
 24 devastated. And you make the point, which I entirely
 25 understand, is that if one applied a simple

19

1 "but for" test, the claim would fail because you
 2 wouldn't be able to say that but for the damage to the
 3 hotel the loss would have been suffered because it would
 4 have been suffered anyway, and one shouldn't allow the
 5 claim to be defeated because there's another sufficient
 6 concurrent cause.

7 But let's now consider a separate situation.
 8 Suppose that the hotel, because it's perhaps in
 9 a sheltered position, it gets off quite lightly with not
 10 very much damage compared with most of the surrounding
 11 area, and after a week it is able to open again,
 12 although perhaps it's still got some damage, the top two
 13 floors are out of action, but the rest of the hotel is
 14 functioning, but nobody comes to the hotel because the
 15 surrounding area is damaged, or hardly anyone comes.

16 Now, here you can't say that but for the damage to
 17 the hotel, the loss would have been suffered anyway
 18 because it wouldn't. Here the loss is caused not by the
 19 damage or part of it, not by the damage to the hotel but
 20 only by the damage to other properties which are not
 21 insured. So how, on your case, do you adjust that loss?

22 MR EDELMAN: That is actually precisely the scenario that is
 23 posited in the textbook example that I showed you,
 24 because he said the hotel and the access bridge are
 25 damaged and the diagram may have been difficult to

20

1 understand, but what he was saying is during the period
 2 of closure which is referable to the damage, you
 3 essentially say you've got concurrent causes of the fact
 4 that you can't have any customers and you pay out
 5 ignoring the wide area damage.
 6 You then come to the post-repair period. If you
 7 remember, the text there was explaining you do still
 8 have to make the assumption that in normal circumstances
 9 if you've been closed for a week it might take you some
 10 time to recover your full clientele because the word
 11 might go around "Oh, it was damaged by a hurricane" and
 12 people might be put off.
 13 So what was being said in that text as an example --
 14 and I can't do better than that -- was you accept that
 15 there wouldn't have been any customers anyway because of
 16 the wide area damage, but you don't in those
 17 circumstances say zero. You don't say "Well, once it's
 18 reopened it wouldn't have had any customers anyway".
 19 You say "In the normal world" -- let's say in the week
 20 afterwards it would have had 50% of its normal capacity
 21 and in week 2 it would be back to its 100% normal
 22 capacity because it would have done an advertising
 23 campaign "We're open, we're back in business.
 24 Miraculously we were only lightly damaged". So you
 25 would compensate them for the 50% loss in the week after

1 the damage because that's what would have happened in
 2 the normal world, but you do not compensate them for the
 3 extra 50% on the basis that they did reopen but there
 4 was nobody there because of the wide area damage because
 5 then that would cease to be indemnifying them for the
 6 damage. You would only be indemnifying them for the
 7 wide area damage, which on this hypothesis is not
 8 insured.
 9 LORD LEGGATT: Yes. But I think what you said may coincide
 10 with what I was thinking about this which is maybe in
 11 the Orient-Express Hotels case both parties were arguing
 12 for a wrong position. One side, the insurers, were
 13 saying you compare damaged hotel in damaged city with
 14 an undamaged hotel in damaged city, and one can see the
 15 objections to that. But the insured was saying you
 16 compare damaged hotel in damaged city with undamaged
 17 hotel in undamaged city, and that also has its problems.
 18 MR EDELMAN: Yes.
 19 LORD LEGGATT: It seems to me maybe the correct analysis is
 20 what you compare is undamaged hotel in undamaged city
 21 with damaged hotel in undamaged city. In other words,
 22 you assume for the purposes of the adjustment that the
 23 city hasn't been damaged and you look in terms of what
 24 last year's turnover was, let's say, updated for trends
 25 and then compare the two alternatives to the hotel

1 within that. Is that possibly a way of looking at it?
 2 MR EDELMAN: Yes, my Lord, and if you reflect on what is
 3 actually being done by doing that, what you're doing is
 4 taking out the hurricane for all purposes. You're
 5 taking out the peril for all purposes. Insurers have
 6 misunderstood, with respect to them, what we're saying
 7 about that because when we say "Well, you take COVID
 8 out", they're saying "Ah, that means Mr Edelman wants
 9 all the indemnity for all the effects of COVID". The
 10 answer I gave to my Lord -- I think it was my Lord
 11 Lord Briggs -- that's not the point because here we're
 12 on the adjustment and it's the point about when you're
 13 looking at that post-repair period -- because when it's
 14 closed, it's closed, it's 100% -- but when you're
 15 looking at the post-repair period for loss of turnover
 16 you are looking at, well, what would have happened in
 17 a normal world with no hurricane anywhere? You would
 18 have got 50% of your turnover. You in fact got zero, so
 19 we are going to give you 50%.
 20 In fact, you can't say you would have got 100% from
 21 being -- you can't claim more on the basis of the
 22 non-existence of the hurricane when you come to all
 23 other losses and say "Well, I didn't just lose 50% of my
 24 revenue, I lost 100%". They say no, that's not the
 25 answer.

1 That's why I said also one of the difficulties with
 2 Orient-Express is that it was an arbitration decision.
 3 We say we don't really know -- we don't know, the public
 4 don't know -- how the case was actually argued. We
 5 don't have the full award in the judgment. Of course,
 6 on appeal the approach to the judgment is conditioned by
 7 the way in which the case has been argued and therefore
 8 decided because there has to be an error of law in the
 9 decision and the decision itself is driven by the way
 10 the case is argued.
 11 LORD LEGGATT: Thank you.
 12 MR EDELMAN: With respect, you know, we say that the answer
 13 is to be found in that textbook, which actually explains
 14 how it should be done. I think I've got one minute
 15 left. I will maybe just have a quick look at RSA4,
 16 enforced closure. It's at 1321 {C/17/1321}. Just to
 17 point out that the real question here, no real
 18 additional question, it's whether "enforced" makes --
 19 it's at the top of the page in the right-hand corner --
 20 whether the word "enforced" makes any difference. We
 21 say no, it's still something that you didn't do
 22 voluntarily. You were forced to do it, but that doesn't
 23 mean legal compulsion. It just means you didn't wake up
 24 one morning and decide "I don't fancy working today, I'm
 25 going to close the shop". You were forced to do

1 something you wouldn't otherwise have wanted to do.
 2 My Lords, otherwise for the remaining policies
 3 I will have, as Mr Gaisman did for some of his grounds
 4 for want of time, to rely on our written submissions,
 5 but in the comfort at least that by and large they are
 6 provisions which are not actually material to the
 7 outcome of the policyholders on those policies, albeit
 8 that the principle is important across the board
 9 generally, but they raise very similar points to other
 10 points in the case.
 11 My Lord, those are my submissions and I think it's
 12 11.17, we over my time to be quiet.
 13 LORD REED: Well, thank you very much, Mr Edelman. We turn
 14 next then to Mr Lynch representing the
 15 Hiscox Action Group.
 16 Submissions by MR LYNCH
 17 LORD REED: Yes, Mr Lynch.
 18 MR LYNCH: My Lords, good morning. It seems that my camera
 19 has decided to go on a voyage of its own which I hope
 20 I can repair.
 21 (Pause)
 22 My Lords, I hope that's satisfactory.
 23 LORD REED: Yes, that's fine, thank you.
 24 MR LYNCH: My Lords, thank you. My Lords, as you're aware,
 25 I appear for the Hiscox Action Group with the perhaps

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1 regrettable acronym the HAG. Acting as I do for real
 2 policyholders, I would like to extend our gratitude to
 3 the court and to the court staff for holding this
 4 hearing so remarkably quickly and efficiently. We are
 5 very grateful.
 6 I have the unenviable risk of following my learned
 7 friend Mr Edelman and attempting to add to rather than
 8 detract from his submissions. My allotted time is 40
 9 minutes. The HAG has three grounds of appeal and Hiscox
 10 has eight grounds of appeal, it will not be
 11 realistically possible for me to address all 11 grounds
 12 in 40 minutes. In respect of our appeal and Hiscox's
 13 appeal, both their oral and written submissions
 14 I therefore adopt our written case and our responsive
 15 case together gratefully with the FCA's written case and
 16 responsive case and the oral submissions of my learned
 17 friend Mr Edelman.
 18 If we could please turn to C/3/410, which is the
 19 public authority clause in Hiscox1. This is the
 20 centrally important clause for the HAG and in fact the
 21 basis for all claims put by them.
 22 LORD REED: Could you give us the page number again please,
 23 Mr Lynch?
 24 MR LYNCH: Yes. So it's bundle C, tab 3, page 401
 25 {C/6/401}.

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1 LORD REED: Yes, 401, thank you.
 2 MR LYNCH: Thank you. It's clause 13. I intend to focus on
 3 three topics. First, three points on how to go about
 4 construing the clause.
 5 Secondly, our third ground of appeal addressing the
 6 "your ability to use the insured premises" wording.
 7 Thirdly, to the extent that there's time, some very
 8 brief comments on the "due to restrictions imposed by
 9 a public authority ..." wording.
 10 Now, I will attempt to avoid overlap with Mr Edelman
 11 but it will be inevitable that there will be some and if
 12 I could just make one obvious first point, which is that
 13 it has been necessary for the purpose of rationalising
 14 the parties' various grounds of appeal to break up the
 15 public authority clause into phrases or even single
 16 words. Of course, that is not the correct approach to
 17 construction and the clause must, of course, be read as
 18 a whole.
 19 So if could turn please to three points on the
 20 approach to construction. Whilst all parties to these
 21 appeals cite largely the same authorities on
 22 construction and as was the case below profess to be
 23 applying the same principles, the way in which Hiscox
 24 has done so, we suggest, invites a critical examination
 25 of whether there are, in fact, important differences of

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1 nuance that have emerged in the process of application
 2 but which have an overarching impact on the parties'
 3 approaches to the specific issues of construction
 4 articulated in their grounds of appeal. In that
 5 respect, we draw attention to three points that we
 6 submit are of assistance in relation to each of the
 7 HAG's and Hiscox's grounds.
 8 First, the role of foreseeability in the
 9 construction of policies of insurance; second, the
 10 meaning of the reasonable expectations of the parties;
 11 and, third, the point that these are simple policies.
 12 On our first point of construction, the role of
 13 foreseeability in the construction of policies of
 14 insurance, on the Hiscox wordings it is wrong to suggest
 15 that in the present context the nationwide pandemic and
 16 government's response were not within the risks which
 17 the parties objectively contemplated, but in any event
 18 the correct approach to the law on this issue of
 19 foreseeability is, we propose, as follows.
 20 I have five points here. So, first, please could we
 21 go to {C/6/402}, so one page on from where we are, and
 22 we see in clause 19, 19, this is a clause to which my
 23 learned friend Mr Edelman has already taken
 24 your Lordships. This is a cancellation and abandonment
 25 wording and in particular (iii), which your Lordships

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1 may recall reads is an exclusion for.
 2 "Any action taken by any national or international
 3 body or agency directly or indirectly to control,
 4 prevent or suppress any infectious disease."
 5 Now, this wording appears in Hiscox1 lead, Hiscox 4
 6 lead and Hiscox 4 variant with NDDA clause. The obvious
 7 point to draw from this is that on this wording the
 8 draftsman had well in mind and foresaw the possibility
 9 or probability of (a) a pandemic or epidemic and (b)
 10 {C/6/402}:
 11 "Any action taken by any national or international
 12 body or agency directly or indirectly to control,
 13 prevent or suppress any infectious disease."
 14 The second point under this heading is to refer to
 15 the factual matrix. Now, I won't go over the ground
 16 that my learned friend Mr Edelman has already gone over,
 17 but that appears at paragraphs 28 to 31 {G/5/11} to
 18 {G/5/13} of the FCA's skeleton for the first instance
 19 trial and also was addressed by my learned friend
 20 Mr Edelman, draft transcript Day 3, page 5, lines 4 to
 21 20 and pages 13 to 14 {Day3/5:7}, {Day3/13-14} when
 22 your Lordships will recall that my learned friend
 23 addressed the examples of SARS and the 1987 storms.
 24 It is also right to note that the public authority
 25 clause in the Hiscox wording refers to

1 "notifiable diseases" rather than, as some insurers do,
 2 a closed list and Hiscox's inherently thereby allowing
 3 for new diseases, ie building an unforeseen or
 4 unforeseeable diseases.
 5 Third, under this first point of construction, we
 6 would refer to the guidance given by my Lord
 7 Lord Justice Leggatt, as your Lordship then was, in the
 8 Equitas case which appears in relevant part at
 9 {E/14/266} and if I could invite your Lordships, if it's
 10 convenient, to go to that, please. This is
 11 paragraph 159, where my Lord addressed this issue and
 12 also quoted from the judgment of Lord Justice Chadwick
 13 in the Bromarin case and reading the passage at 159:
 14 "True it is that the question whether a term must be
 15 applied is to be judged at the date when the contract
 16 was made ... and that when the relevant reinsurance
 17 contracts were made the parties could not have foreseen
 18 the situation that has arisen as result of the law's
 19 response to mesothelioma claims. The court's task is
 20 nevertheless to consider how reasonable parties should
 21 have been taken to have intended the contract to work in
 22 the circumstances which have in fact arisen."
 23 Then, quoting from the Bromarin case:
 24 "The task of the court is to decide, in the light of
 25 the agreement that the parties made, what they must have

1 been taken to have intended in relation to the event...
 2 which they did not contemplate. That is, of course,
 3 an artificial exercise, because it requires there to be
 4 attributed to the parties an intention which they did
 5 not have (as a matter of fact) because they did not
 6 appreciate the problem which needed to be addressed.
 7 But it is an exercise which the courts have been willing
 8 to undertake for as long as commercial contracts have
 9 come before them for construction."
 10 Now, although my Lord Lord Leggatt's comments in
 11 Equitas were made in the context of a question about the
 12 implication of a term, we do not understand the
 13 proposition your Lordship expressed to be anything other
 14 than an uncontroversial statement of the court's
 15 approach to construction generally. Indeed,
 16 Lord Justice Chadwick's comments in Bromarin arose in
 17 the context of a question of construction of a clause,
 18 rather than the implication of one.
 19 It is also relevant to note that in the sentence
 20 immediately preceding the part of Bromarin that my Lord
 21 Lord Leggatt quoted in Equitas, Lord Justice Chadwick
 22 also said this. If we could go, please, to {F/10/148}
 23 we see there a passage in the Bromarin case at G. And
 24 at G, my Lord Lord Justice Chadwick stated:
 25 "It is not, to my mind, an appropriate approach to

1 construction to hold that, where the parties have
 2 contemplated event 'A', and they did not contemplate
 3 event 'B', their agreement must be taken as applying
 4 only in event 'A' and cannot apply in event 'B'.
 5 That approach, which Lord Justice Chadwick describes
 6 as in inappropriate, is, with respect, precisely the
 7 approach we suggest Hiscox has adopted in relation to
 8 these questions of construction.
 9 Hiscox's reliance on the statements of
 10 Sir Thomas Bingham MR in the Philips case at
 11 {G/77/1556}, I don't propose we go to that, can be
 12 quickly dismissed. That relates to a different issue.
 13 The implication of a term was what was relevant there
 14 and the correct warning to the courts not to come to the
 15 task with the benefit of hindsight and fashion a term
 16 which reflects the merits of the situation as they then
 17 appear. However, your Lordships are not being asked to
 18 imply any term. This is simply a different situation
 19 and it's a different situation as a matter of principle
 20 because as Sir Thomas Bingham held at page 481
 21 {G/77/1555}:
 22 "The implication of contract terms involves
 23 a different and altogether more ambitious undertaking:
 24 the interpolation of terms to deal with matters for
 25 which, ex hypothesi, the parties themselves have made no

1 provision. It is because the implication of terms is so
2 potentially intrusive that the law imposes strict
3 constraints on the exercise of this extraordinary
4 power."

5 Our fourth point under this first point of
6 construction is that insurance policies, just like any
7 other contract, are never going to describe with perfect
8 specificity the events that trigger cover. Instead what
9 they do is categorise risks in ways that leave a large
10 scope for those risks to materialise in unforeseen ways.
11 That insurance policies operate in this way is part of
12 their nature and part of why they are commercially
13 successful. There is much variation in how events occur
14 in life and that range of potential fact patterns must
15 be caught by insurance policies, if they're to operate
16 at all, by describing cover in a way that allows for
17 such flexibility.

18 Our fifth and final point under this first heading
19 is that it is important not to confuse two different
20 questions. One, what is covered and, two, how did that
21 covered risk eventuate? Absent an express exclusion,
22 the question of whether two is foreseeable matters
23 little if the risk is within the scope of the clause.

24 I would refer here to a case with memorable facts.
25 My learned — I'm sorry to interrupt, but I suppose I'm

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1 interrupting my own flow — I see my learned friend
2 Mr Edelman has turned his video off. I'm grateful.

3 Sorry to break off in that way, but I come back to
4 the case I was going to, which is *Harris v Poland* which
5 appears at {H/1/1} and it's a case with memorable facts
6 which are referred to be way of example. The short
7 point is that where damage was caused by fire and that
8 was covered, it was unimportant the way in which the
9 damage caused by the fire eventuated and whether or not
10 that — sorry, what was unimportant was that the way
11 that the fire eventuated was foreseeable or not.

12 So to explain that by reference to the facts: This
13 was a judgment of Mr Justice Atkinson concerning a claim
14 under a fire policy. In that case, the insured placed
15 jewellery for safeguarding in a fireplace hidden under
16 coal and wood. She went out, when she returned she
17 forgot this and lit the fire causing damage to her
18 jewellery. She made a claim under her policy which
19 insurers denied. The language of the relevant insuring
20 clause was in broad terms and stated that cover was
21 provided against loss or damage caused by fire. That,
22 for the court's reference, is at {H/1/3}. The claimant
23 straightforwardly submitted that her loss fell within
24 that clause.

25 Now, one way of characterising the insurer's

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1 arguments which we don't have time to go in to detail
2 which is at page 465 {H/1/4} the insurer's argument
3 could be characterised as saying the way in which the
4 risk eventuated, namely the damage caused by fire, was
5 unforeseeable because nobody would have thought that
6 damage caused by fire in a place where fire is supposed
7 to be would be covered and nobody would have thought
8 that someone would hide their jewellery in the fireplace
9 and then set fire to it.

10 But that argument was rejected, rightly, by
11 Mr Justice Atkinson who found for the plaintiff. In
12 an approach which we suggest entirely constant with the
13 modern approach to construction, Mr Justice Atkinson
14 began by considering what the simple words of the policy
15 would mean to the ordinary man and held that there was
16 no basis for reading into those ordinary words
17 a limitation that is not there. Now, if I refer
18 your Lordships to pages 466 to 468 of the report which
19 are at {H/1/5} to {H/1/7}. We don't have time to go to
20 those now.

21 Those were our points on foreseeability.

22 Our second heading on points of construction
23 generally is as to the meaning of the reasonable
24 expectation of the parties. Now, here we seek with
25 respect to develop and expand upon a comment made by my

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1 Lord Lord Reed at draft transcript Day 3, page 112,
2 line 18 to Day 3, page 113 line 13 {Day3/112:18},
3 {Day3/113:13} and Mr Edelman's responses at pages 113 to
4 115 {Day3/113–115}.

5 My Lord Lord Reed's comment was about how it is
6 relevant to the interpretation of the trends clause that
7 insurers' construction incentivises insureds to ignore
8 government advice issued in the interests of public
9 safety and thereby encourages socially irresponsible
10 behaviour. My Lord commented that one has to interpret
11 the contract to reflect what would reasonably be taken
12 the parties' intention — sorry, I've misquoted that.

13 "One has to interpret the contract ... which
14 reflects what one could reasonably take to be the
15 parties' intention."

16 And that's draft transcript Day 3, page 113,
17 lines 11 to 13 {Day3/113:11}.

18 Now, our general point here is that what one assumes
19 the parties' intentions to be is grounded in community
20 values and this chimes with my Lords' points about
21 discouraging socially irresponsible behaviour. The
22 authority in particular is the article by Lord
23 Lord Steyn contract law fulfilling the reasonable
24 expectations of honest men at {H/2/16}, which was
25 enforced by the Supreme Court in *Rainy Sky* at

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1 paragraph 25 in the judgment of my Lord Lord Clarke.
 2 Now, I won't go through the article in detail
 3 obviously, but briefly the relevant points are these.
 4 The notion of reasonableness in this context is neither
 5 abstract nor technical, but is to do with what
 6 Lord Steyn describes as "Community values".
 7 "It is concerned with contemporary standards not of
 8 moral philosophers but of ordinary right thinking
 9 people."
 10 A reasonable expectation of the parties takes its
 11 distinctive colour from the context of the transaction
 12 and the HAG submits that the following facts are
 13 relevant.
 14 One, that the insured are SMEs; two, with low levels
 15 of sophistication as purchasers of insurance; three, low
 16 levels of indemnity; and four, the off-the-shelf nature
 17 of the policies.
 18 Further, the fact that these are all businesses in
 19 the real world, many in public facing forms of
 20 enterprises and for very good reason, and obvious
 21 reasons, strongly indicates that the parties would
 22 expect compliance with government statements, whether or
 23 not they technically had the force of law when given, as
 24 my Lord Lord Reed put it:
 25 "One has to interpret the contract ... which

1 reflects what one could reasonably take to be the
 2 parties' intention."
 3 This is particularly relevant to the restrictions
 4 imposed wording but obviously relevant to the inability
 5 to use wording which must follow from the restrictions
 6 imposed.
 7 The reasonable expectations of the parties is also
 8 consistent with taking the purposive rather than
 9 literalist approach to construction. The approach which
 10 best gives effect to the reasonable expectation of the
 11 parties is one in which dictionaries are generally of
 12 little help and the commercial purposes of the contract
 13 is more important than niceties of language.
 14 Our third and final point on approach to
 15 construction concerns the simple nature of these
 16 policies. Our proposition is that these policies should
 17 be construed in a straightforward and uncomplicated way.
 18 Please see paragraph 8 of our written case {B/3/80}.
 19 Why does this matter? Because Hiscox's approach to
 20 the construction and application of the clause results
 21 in various respects in extremely complicated, indeed
 22 unworkable, complexity when these are meant to be
 23 commercially realistically and readily applicable
 24 policies capable of straightforward application in
 25 everyday scenarios with low limits of indemnity and not

1 much time or money being spent in their mundane
 2 application.
 3 In particular, this is a point of most obvious
 4 relevance to the counterfactual. The parties cannot
 5 objectively have intended a counterfactual which could
 6 never have existed in the real world. For example,
 7 depending on how my learned friend Mr Gaisman puts
 8 Hiscox's case, the nail salons issue, which would be
 9 likely to give rise to complicated issues on application
 10 and the adjustment of claims even if that is possible on
 11 Hiscox's approach.
 12 These are complicated and expensive issues that
 13 small insureds are often unable to afford to pay and if
 14 my learned friend Mr Gaisman, with his references to the
 15 arbitration and to the ombudsman, inadvertently gave the
 16 impression that all of this is going to be very easy,
 17 then that would, in the HAG's submission, be a false
 18 impression. This would not be easy, this would be
 19 complicated and expensive and inappropriate for this
 20 kind of policy.
 21 We would submit that this position is supported by
 22 five points.
 23 First, this is supported by the Hiscox itself at
 24 paragraph 6 of its reply submissions {B/14/551} where
 25 Hiscox describes as not controversial that the policies

1 should be:
 2 "Comprehensible, clear and readily applicable in the
 3 real world."
 4 Second, it is supported by the wording itself.
 5 {C/6/374}, this is the introductory wording to many
 6 Hiscox policies:
 7 "We hope that the language and layout... are
 8 clear ... we want you to understand the insurance we
 9 provide."
 10 Third, it is further supported by the judgment of my
 11 Lord Lord Hodge in Wood v Capita {G/94/1958}, at
 12 paragraph 10 at B, and 12 and 13 at C and E. This is
 13 just a consequence of general principles of
 14 construction.
 15 Fourth, our position is consistent with Lord Steyn's
 16 analysis of the reasonable expectation of the parties
 17 which places emphasis on: (1) what words mean to the
 18 ordinary speaker of English; (2) the role of community
 19 values in understanding the reasonable expectations; and
 20 (3) the importance of the nature of the transition in
 21 giving those reasonable expectation -- sorry, the
 22 importance of the nature of the transaction in giving
 23 those reasonable expectations their "distinctive
 24 colour".
 25 Fifth and finally on this point, it is supported by

1 the approach and reasoning in Harris v Poland, which
2 we've seen.

3 That brings an end to our points on construction.
4 Obviously those points are intended to apply by way of
5 general application and not simply limited to the HAG's
6 grounds 2 and 3, which I now go on to address.

7 Turning now to our ground 3, our third ground of
8 appeal is in summary that the court took, with respect,
9 an unduly narrow approach to the inability to use
10 wording and if we could please then go back to bundle
11 {C/6/401} at clause 13, there we see again the public
12 authority wording.

13 Now, there are six overarching points relevant to
14 the construction of "inability to use". The first point
15 goes to the natural and ordinary meaning of the term
16 "inability to use".

17 The short point here -- and the short answer to
18 a lot of Hiscox's arguments on this issue -- is that it
19 is common ground that inability to use the insured
20 premises means asking: can the insured use its premises
21 for its business activities or not? One sees that
22 that's common ground at, for example -- I know there are
23 lots of examples -- but one example paragraph 80 of
24 Hiscox's reply submissions at {B/14/571}. Now, Hiscox
25 asserts that this is a simple binary question. One can

1 see that that cannot be right, with respect. The real
2 problem for Hiscox here is that as soon as one
3 introduces the qualification of "for its business
4 activities" the question goes from being allegedly
5 binary to obviously not binary. The "for its business
6 activities" qualification, which it is common ground is
7 correct, adds an immediately qualitative fact-sensitive
8 and purposive meaning to the clause which can only be
9 answered by looking at the facts of individual cases to
10 determine whether or not the insured can use its
11 premises for its business activities or not which will
12 necessarily include a wide range of factors specific
13 each insured and the nature of their business.

14 But what are the insured's business activities? Now
15 my learned friend Mr Edelman has addressed you on this
16 already. It means their normal business activities.
17 This will be in part evidenced on the face of the policy
18 schedule, as my learned friend Mr Edelman has already
19 said. For example, {C/6/360}, the insured is a bike
20 repairer and retailer, but obviously the schedule only
21 takes one so far. The real answer will depend on the
22 true facts of any individual case.

23 Why add the qualification of asking what are the
24 insured's normal business activities? Because that is
25 the true question. It is inherent in asking what are

1 the insured's business activities? Of course this will
2 depend on the facts because some businesses do multiple
3 things. If a dine-in restaurant can only function as
4 a takeaway that is not using its premises for its normal
5 business activities. If the gunsmith, gun retailer,
6 which is Hiscox3 {C/8/433} can only use its premises to
7 answer the telephone about gun upkeep, then the gunsmith
8 is not using its premises for its normal business
9 activities, ie actually repairing, modifying and
10 building guns.

11 Here "partly unable" means unable in the context of
12 a business insuring the ability to use its business
13 premises.

14 Further, the necessary element to assessing whether
15 the insured can use its business premises for its
16 business activities or not involves a quantitative
17 assessment of the position on the facts. In other
18 words, pulling those two elements together, a sliding
19 scale of whether the insured can use its premises for
20 its business activities or not in terms of (1) the volume
21 of work done, 10% or more; (2) the nature of the work,
22 is the dine-in restaurant now only a takeaway?

23 These questions of fact and degree are not difficult
24 or so complicated as to be unworkable. They are simple
25 questions of fact which the courts and arbitrators are

1 well used to addressing and are simply answered in
2 simple low-value cases and which adjusters have been
3 doing for, of course, many years.

4 Whether or not an insured can use its premises for
5 its business activities is not a binary question, it is
6 only capable of the answer "completely unable to use the
7 premises" or "completely able to use the premises,"
8 contrary to what Hiscox contends in its reply
9 submissions paragraph 80 {B/14/571}.

10 If we take just one example, this is a golf club
11 example, which appears at example 6 of our written case
12 {B/3/100}, the insured is a golf club which consists of
13 a golf course and a clubhouse which serves food and
14 drink, alongside hosting events and conferences. The
15 entirety of the business was shut following the
16 imposition of regulation 4(4) on 26 March, although the
17 submissions was permitted to have groundskeepers on the
18 premises for the maintenance of the golf course.
19 Following the government announcements and guidance
20 given on 13 May, the business was permitted to reopen
21 its golf course but the clubhouse had to remain shut.
22 This resulted in a severe dip in the number of
23 customers.

24 Here, on reopening, plainly the insured was unable
25 to use the clubhouse and suffered business interruption

1 and loss and thereby loss. But the ability to use the
 2 golf course would, on the court's approach, be more than
 3 vestigial and therefore there would arguably be no
 4 recovery. This, with respect, indicates that something
 5 has gone wrong with the court's approach, particularly
 6 if one posits the further example: what if they were
 7 different businesses; one could recover and one
 8 couldn't?

9 Now, our second point under this ground 3 is that,
 10 contrary to other wordings in the policy, the word
 11 "inability" does denote the specific extent to which the
 12 insured lacks the inability to use. It does not suggest
 13 that the insured must be completely unable to use the
 14 premises. My learned friend Mr Edelman has already
 15 taken you to the bomb threat clause, that's clause 4
 16 {C/6/400} which refers to total inability to use and
 17 also I believe my learned friend took you to it, but in
 18 any event clause 3, the NDDA clause {C/6/400}
 19 an incident which results in denial of access or
 20 hindrance in access to the premises.

21 Hiscox's responses are interesting. They say at
 22 paragraph 97 {B/14/577}, they argue that the use of the
 23 word "total" in the bomb threat clause is readily
 24 explicable because, when compared to the hindrance in
 25 the NDDA clause, it reflects the parties' desire to make

1 clear that only if there was no access at all would the
 2 clause bite in the case of a bomb threat. Our simple
 3 response is that this contradicts Hiscox's own case.
 4 If, as Hiscox argues, the word "inability" naturally
 5 denotes total inability, then there would be no need to
 6 include the word "total" in the bomb threat clause in
 7 order to differentiate it from the weaker requirement of
 8 hindrance, as this -- my Lord Lord Leggatt.

9 LORD LEGGATT: Just reflecting on your point about whether
 10 it's binary or not, I can see your argument. Perhaps
 11 the answer is in a way it is binary but it depends how
 12 you're looking at the clause. I can see your argument
 13 that if you can't use the premises for a particular
 14 discrete activity or if you can't use part of the
 15 premises, then you can still come within the cover.

16 But on the other hand, let's suppose that you can
 17 use the premises but many fewer people can come in
 18 because you have to or you are observing social
 19 distancing and so you ration the number of people who
 20 can come in. You couldn't say that that was
 21 an inability to use, could you?

22 MR LYNCH: Well, my Lord, the answer will be a matter of
 23 fact and degree in each case and the answer will be it
 24 will be, depending on the facts, an inability to use to
 25 the extent of the inability and obviously one difficulty

1 is talking about these issues in purely hypothetical
 2 terms, but it doesn't take much for one to recognise
 3 that a business is only made up of employees and
 4 customers in large part for these kinds of businesses
 5 and there may be a point where it becomes clear that
 6 enough of a downturn is suffered by enough of
 7 a percentage of employees/customers being unable to
 8 attend for it properly to be called an inability to use
 9 and that will be, as I've said, a quantitative and
 10 qualitative assessment. But it would be wrong in
 11 principle, in my submission, to say that across the
 12 board because some people can attend it's not
 13 an inability to use.

14 LORD LEGGATT: Thank you.

15 MR LYNCH: My Lord, our third point under this heading is
 16 that our construction is supported by sub-clauses (a) to
 17 (e) and this is just a very brief point looking at
 18 clause 13 itself.

19 Here, Hiscox makes the point, well, look at
 20 sub-clauses (a) to (e), page 401 {C/6/401}. It's likely
 21 that there will be a complete inability to use because
 22 of those. Well, no, it's equally likely that there will
 23 be a partial inability because a flood might affect one
 24 part of a property or one category of work being done.
 25 It's not a complete inability that must follow.

1 Our fourth point is that the surrounding clauses in
 2 the Hiscox policies support our construction. My
 3 learned friend Mr Edelman has addressed these so I will
 4 just do these briefly. We see at {C/6/403} the "Loss of
 5 income" wording. Please see an example there:

6 "We will also pay for increased costs of working and
 7 alternative hire costs."

8 And then also the definition of "Increased costs of
 9 working" itself appears at page 399 {C/6/399}:

10 "The costs and expenses necessarily and reasonably
 11 incurred by you for the sole purpose of minimising the
 12 reduction in income from your activities during the
 13 indemnity period, but not exceeding the reduction in
 14 income saved."

15 Here the clause is obviously envisage "working", in
 16 the present tense. It seems clear that these clauses,
 17 the policy itself, envisages, for example, alternative
 18 hire costs at {C/6/399} as well. The business
 19 continues. So to take my Lord Lord Leggatt's point,
 20 it's envisaged by the policy wording itself that there
 21 is a continuation in the business. The question is: is
 22 there sufficient on the facts for it to be called
 23 an inability to use and, if so, on the facts what form
 24 does that take in each case?

25 Hiscox relies on the definition of "indemnity

1 period" which appears at 399 {C/6/399} and Hiscox argues
 2 that the word "restriction" there means only
 3 restriction. It does not stand in for the full insured
 4 peril. That is, with respect, wrong for the reasons we
 5 address in our written case, but is also contrary to the
 6 judgment where it's made clear that where there's
 7 reference to "restriction" it means the insured peril.
 8 That can only be right because otherwise the indemnity
 9 period would commence when there isn't an indemnity, so
 10 restriction must mean insured peril which takes away
 11 from Hiscox's argument on this point.

12 There's also at page 378 {C/6/378}, if I could go to
 13 that, please, of the policy wording there's
 14 an obligation on the insured to take every reasonable
 15 step — sorry, it's down at the bottom of the page at
 16 378 "Your obligations", at clause 2(a):

17 "You must:

18 "a. make every reasonable effort to minimise any
 19 loss, damage or liability and take appropriate emergency
 20 measures immediately if they are required to reduce any
 21 claim ..."

22 Now, here an insured will be under an obligation to
 23 minimise their losses which may mean branching out into
 24 other areas of loss, carrying on other types of
 25 business, is it right that that should be held against

1 them because then there would not be a complete
 2 inability?

3 The fifth point is that Hiscox's construction is
 4 uncommercial and renders cover illusory. The reality of
 5 Hiscox's position is that as soon as there's some use of
 6 the property for the business purposes, then there's no
 7 indemnity. That cannot be right and it's contrary to
 8 all the well-known authorities on this point, for
 9 example *Cornish v Accident Insurance*: please see
 10 {D/24/1628} paragraph 57 of our skeleton argument at
 11 first instance.

12 Then our sixth and final point on inability to use
 13 is regulation 6.

14 Now, the court's finding was at J270 — excuse me,
 15 I'm just receiving a message.

16 Yes, so this is on regulation 6. The court found at
 17 judgment paragraph 270, which is {C/3/112} that cases in
 18 which regulation 6 would cause an inability to use the
 19 premises would be rare. Now, with respect, that can't
 20 be right. First, there was no evidence before the
 21 court, but if it's right that regulation 6 is indeed
 22 a restriction imposed, which it is, then there will be
 23 many cases where the regulation 6 "causing an inability
 24 to use" would not be rare at all.

25 So, for example, an accountant using the office and

1 going in only to look at confidential documents. Well,
 2 realistically that isn't — that is an inability to use
 3 that and that is the effect of regulation 6.

4 With my one last minute, I just turn to our ground 2
 5 just to make some very brief points.

6 The first point on — and this is our ground 2 which
 7 addresses the restrictions imposed. Just on
 8 restrictions imposed, if I could please ask the court to
 9 draw a parallel between the current lockdown we are in
 10 and the lockdown that we were in.

11 The difference here is that the Prime Minister
 12 announced the restrictions on 31 October and had time to
 13 bring into effect the relevant regulations by
 14 5 November. The situation in the first lockdown was
 15 more desperate and more urgent, and more worrying, yet
 16 that on Hiscox's case would not be a restriction imposed
 17 and that is an unrealistic construction, we would
 18 suggest.

19 My Lords, my time is up. Unless I can assist
 20 your Lordships further, those are our submissions.

21 LORD REED: Thank you very much, Mr Lynch. Well, we adjourn
 22 now for five minutes and then we'll resume to hear the
 23 reply by the appellant insurers.

24 (11.58 am)

(A short break)

1 (12.04 am)

2 Submissions in reply by MR LOCKEY

3 LORD REED: So we turn now to the insurers and I think we're
 4 beginning with Arch Insurance represented by Mr Lockey.

5 MR LOCKEY: Good morning, my Lords. In my 30 minutes I have
 6 to deal with ground 3 of the FCA's appeal, my reply to
 7 the FCA's response to Arch's appeal and causation and
 8 thirdly and finally my response to ground 1 of the FCA
 9 appeal. So if we can start with ground 3 of the FCA's
 10 appeal.

11 That seeks to extend against Arch very considerably
 12 the number of policies which have been triggered and, as
 13 I explained to your Lordships on Tuesday, the court
 14 below accepted Arch's case as to what triggered the
 15 extension 7, the GLAA clause, and for which categories
 16 of business at paragraphs 309 to 336 of the judgment
 17 {C/3/122}, {C/3/129} and we fully support and endorse
 18 the reasons given by the court in those paragraphs.

19 As your Lordships will have seen, the court below
 20 engaged in a careful exercise of construing and then
 21 applying the extension to the various categories of
 22 business in light of the advice issued and the actions
 23 taken by the government, all of which advice and action
 24 was also closely examined by the court below during and
 25 no doubt following the eight-day trial.

1 The court also considered the various theoretical
2 examples raised by the FCA, along with some others, but
3 rather than answering those hypothetical questions, the
4 court addressed the facts and produced the judgment
5 which we say is plainly correct.

6 The FCA does not suggest, and Mr Edelman did not
7 suggest, that there were any relevant principles of
8 construction which were misapplied by the court. He
9 doesn't like the result but there's no suggestion that
10 the court below applied the wrong principles. In those
11 circumstances, we suggest that this court should be very
12 slow to interfere with judgment of the court below on
13 those issues.

14 I do make the point that the FCA's case does not
15 really engage at all with the court's reasoning as set
16 out in paragraphs 309 to 336 of the judgment {C/3/122},
17 {C/3/129}.

18 Now, we have responded in some detail to ground 3 in
19 our respondent's case at {B/12/534} and I will to have
20 take that as read.

21 My Lords, the GLAA clause, just to remind you,
22 {C/4/227}, requires that the relevant action or advice
23 prevents access to the premises and can I make three
24 fairly obvious points.

25 Firstly, access to the premises is plainly

1 a reference to the means by which entry or approach is
2 made to the premises. That was common ground below.
3 It's set out at paragraph 315 of the judgment {C/3/123}
4 and is obviously correct. So the relevant enquiry is as
5 to the effect of action or advice on the means of
6 accessing the premises. The enquiry is not into the
7 effect of government action or advice on the movement of
8 people, or on who may enter the premises.

9 The second obvious point is that "prevent" is a word
10 with an ordinary meaning; stopping something from
11 happening or making something impossible. In practical
12 terms, in the context of the subject matter of this
13 litigation, nothing short of action or advice requiring
14 closure will prevent access to the premises. The clause
15 plainly does not contemplate a partial prevention of
16 access and we remain puzzled about how there can be
17 a partial prevention of access to the premises. Either
18 access to the premises is prevented or it's not. The
19 clause is not concerned with limits placed on the uses
20 to which the premises are put or on who may access the
21 premises and for what purpose.

22 The third fairly obvious point is that other
23 provisions in the same policy confirm that our reading
24 of the GLAA clause, which was accepted by the court
25 below, is correct and that nothing short of closure is

1 required on the facts of this case.

2 Yes, my Lord.

3 LORD LEGGATT: There has to be some enquiry, doesn't there,
4 Mr Lockey, into who can access the premises and for what
5 purpose, otherwise there will be no cover unless the
6 premises were sealed off to anybody and nobody could get
7 into them for anything at all?

8 MR LOCKEY: (Inaudible).

9 LORD LEGGATT: This can't be right. If somebody lives above
10 the shop and they come in through the door they are not
11 prevented from access to the premises and yet you,
12 I hope, wouldn't say the clause didn't apply if the shop
13 is closed.

14 MR LOCKEY: No, my Lord, we accepted in the court below and
15 we accept obviously here that the prevention of access
16 refers to access for the purposes of carrying on the
17 business at the premises.

18 LORD LEGGATT: Fine. Then once you accept that, why can't
19 you divide it up into different businesses carried on at
20 the premises and if the food hall is open but the rest
21 of the shop which sells clothes is closed, there's
22 prevention of access to part of the premises.

23 MR LOCKEY: The policy defines "the business" by reference
24 to the terms in the schedule and therefore, for the
25 purposes of the prevention of access clause, the

1 relevant access is to "The Premises", which is referred
2 to elsewhere and defined elsewhere as being the place
3 where the business, as defined in the schedule, is
4 carried out, and therefore those are defined terms, my
5 Lord.

6 LORD LEGGATT: Well, that doesn't mean that you can't have a
7 prevention of access to a part of the premises, the
8 whole encompasses the part, or that you couldn't have
9 prevention of access for one business activity but not
10 for others.

11 MR LOCKEY: No, my Lord, we would with respect disagree.
12 There's simply a binary question by reference to the
13 single defined premises, or in certain cases there will
14 be multiple defined premises, it's the means of
15 accessing those single premises which must be prevented.

16 LORD LEGGATT: What about the business activities which
17 aren't even mentioned in the clause so you have to read
18 in something about that, anyway?

19 MR LOCKEY: Well, that's because the business is defined by
20 reference to the premises and we accept there has to be
21 access to the premises for the purposes of carrying on
22 the business because, for example, if one takes the
23 situation of a bomb scare where the premises are
24 required to be shut off, the fact that someone might be
25 able to go in simply to switch off the electricity does

1 not mean that there's been a prevention of access to the
 2 premises. But subject to that qualification, in our
 3 respectful submission, the clause is simple,
 4 straightforward and provides essentially a binary yes/no
 5 question: are the means of the access to the premises
 6 stopped or not?
 7 LORD LEGGATT: Well, I suppose (inaudible) on your
 8 construction because it produces unreasonable results,
 9 it shuts out everybody. So in the takeaway example, it
 10 seems totally unreasonable to say that there's no
 11 prevention of access for the purpose of dining in the
 12 restaurant just because you can carry on a takeaway
 13 business. There's nothing to stop you separating those
 14 activities, is there, in the clause?
 15 MR LOCKEY: Well, my Lords, the clause is concerned with the
 16 means of accessing the premises, not with the use to
 17 which the premises are put, which is a concept which is
 18 dealt with explicitly elsewhere in the same policy.
 19 Mr Edelman showed you extension 3 on the preceding page.
 20 LORD LEGGATT: Well, then shuts out the repairman from
 21 coming in.
 22 MR LOCKEY: I'm sorry.
 23 LORD LEGGATT: Then it shuts out the repairman from entering
 24 because there is not complete prevention of access for
 25 everybody for all purposes.

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1 MR LOCKEY: For the purposes of carrying on the business
 2 there is. Where there is an existing takeaway business
 3 at the premises and the business is allowed to continue
 4 after the closure order, to continue that business, it
 5 is, in our respectful submission, inconsistent with the
 6 very plain meaning of the language used in clause 7 to
 7 say that there is a prevention of access to the premises
 8 for the carrying on of the policyholder's business which
 9 included the takeaway. The fact that part of the
 10 premises where one dines in can't be used does not
 11 affect the means of access to the premises. The
 12 premises remain fully accessible, it's just the use to
 13 which part of the premises may be put is impeded and
 14 that is dealt with not by clause 7 but by clause 3.
 15 Clause 7 only applies where the means of access is
 16 prevented.
 17 LORD LEGGATT: I hear your submissions, as they say.
 18 MR LOCKEY: Well, my Lord, you've already seen extension 1
 19 which Mr Edelman showed you which refers to hindrance or
 20 prevention of access, and obviously prevention of access
 21 when used again in clause 7 must have the same meaning
 22 as it has in extension 1 and therefore cannot include
 23 hindrance of access.
 24 As far as extension 3 is concerned, as I said that
 25 draws a clear and obvious distinction between prevention

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1 of access to the premises on the one hand and
 2 restrictions placed on the use of those premises on the
 3 other.

4 My Lords, the FCA's case involves the somewhat
 5 remarkable proposition that there was a prevention of
 6 access to the premises for businesses in category 3,
 7 essential retail businesses expressly permitted to
 8 remain open by the regulations, and category 5,
 9 businesses which were not required or advised to close
 10 their premises.

11 The argument is that there's at least a partial
 12 prevention of access to those premises because of
 13 regulation 6 or the social distancing guidance or the
 14 16 March advice of the Prime Minister. But, again, that
 15 proposition only has to be stated for it to be seen to
 16 be wrong. Regulation 6 did not have any impact on the
 17 means of accessing category 3 and category 5 premises,
 18 nor did the social distancing guidelines, the 2-metre
 19 rule or the 16 March advice.

20 The FCA's argument becomes even more absurd when one
 21 appreciates that regulation 6 was itself subject to
 22 exceptions which permits people to attend category 3 and
 23 category 5 premises. For category 3 essential shops,
 24 employees and owners were able to access the premises as
 25 were customers. The FCA's case that during the first

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1 lockdown there was a prevention of access to the
 2 premises of Tesco because of regulation 6 or social
 3 distancing guidelines or the Prime Minister's advice on
 4 16 March is truly absurd.

5 LORD REED: An example that's not so absurd would be a shop
 6 such as Boots which was allowed to continue trading
 7 because they had pharmacies, but the areas that were
 8 selling cosmetics, for example, were closed off and
 9 unmanned. If they'd run two separate shops, one
 10 containing the pharmacy and the other containing the
 11 cosmetics, then obviously the cosmetics shop would have
 12 been closed and they would have recovered under the
 13 policy. As it is, because they had one single outlet,
 14 the public access continued to the outlet but people
 15 could only shop for the essential items and the rest
 16 would be barred by chains or whatever to stop them going
 17 into those areas of the shop.

18 MR LOCKEY: An excellent example, my Lord, of restrictions
 19 placed on the use of the premises, but clause 7 is
 20 concerned with prevention of access to the premises, the
 21 means of accessing the premises, which in
 22 your Lordship's example is not prevented.

23 LORD REED: Yes.

24 MR LOCKEY: My Lords, then if I can respond briefly to the
 25 FCA's response to our appeal on causation, Arch is only

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1 concerned with causation and the trends clause at the
 2 stage of quantification of loss where our extension has
 3 been triggered. We're not concerned with issues of
 4 causation arising at any earlier stage at what
 5 Mr Edelman referred to as the primary causation stage,
 6 which is an issue for the disease clause insurers.

7 Can I return to the example given by Lord Briggs on
 8 Tuesday, Day 2, at page 145 {Day2/143:21}. The travel
 9 agent whose turnover reduces dramatically because no one
 10 is buying holidays in the period before the travel agent
 11 is required to close its premises. Mr Edelman seemed to
 12 be inclined to accept that on that example the losses in
 13 question were not access-related and we say quite right.

14 This shows that there is something wrong with the
 15 FCA's position on the counterfactual and indeed also
 16 with the FCA's appeal on ground 1. That's because the
 17 FCA's case, as you'll remember, is that once the
 18 insured peril is triggered and the remaining conditions
 19 satisfied, all the effects of the underlying elements,
 20 including therefore in Arch the emergency, are included
 21 in the indemnity, and that would include, on the FCA's
 22 case, losses which are not access-related and we would
 23 submit that calculating the travel agent's loss for the
 24 period of closure from the end of March to July 2020 by
 25 reference to the 2019 turnover, without taking into

1 account the losses which would have been suffered even
 2 if the premises had been permitted to remain open, does
 3 indemnify the travel agent against non-access-related
 4 losses.

5 Mr Edelman's albeit tentative response to the travel
 6 agent example demonstrates, in our respectful
 7 submission, why the FCA's argument that trends clauses
 8 are confined to extraneous matters cannot be right
 9 because the emergency which has led to what he has
 10 referred to as the non-access-related losses is not, on
 11 the FCA's case, extraneous to the peril, yet Mr Edelman
 12 appears to accept that non-access-related losses are not
 13 covered.

14 Our objection to the declarations made following the
 15 trial below is that they prevent us from arguing that
 16 all or part of the loss of turnover during the period of
 17 closure, measured by reference to the same period in
 18 2019, would have been suffered in any event even if the
 19 premises had been allowed to remain open by reason of
 20 the economic effects of the pandemic, the stay-at-home
 21 regulation and the social distancing guidance, none of
 22 which are insured perils and that these are losses which
 23 are not access-related losses.

24 Can I remind you in this context of agreed facts
 25 document 8, which is relevant on this issue and indeed

1 to the court's consideration of ground 1 of the FCA's
 2 appeal. This was one of the sets of agreed facts for
 3 the trial bundle {D/12/1545}.

4 These were agreed facts and I would just invite you
 5 to cast your eye -- I'm not sure you've been referred to
 6 this specifically before -- if I could invite you to
 7 cast your eye over paragraphs 1 to 3, I don't have the
 8 time to go through this, but those are important points
 9 to bear in mind that they are agreed facts.

10 My Lords, turning to the Arch's case on "but for"
 11 causation, we say that "but for" causation is positively
 12 required at the quantification stage by the Arch trends
 13 clause. One removes the peril, no more and no less.

14 We submit that proof of "but for" causation is
 15 an essential element of showing that losses have been
 16 caused by the insured peril, a point made in
 17 Orient-Express at paragraph 58 of the judgment in the
 18 Commercial Court {E/31/932} and if necessary the
 19 presence of a trends clause is not crucial, but we don't
 20 need to succeed on that argument because the trends
 21 clause provides the test anyway, which clearly applies
 22 at least at the quantification stage. I appreciate
 23 there's a debate that may be relevant for the disease
 24 clause insurers in relation to the operation of the
 25 peril. But certainly at the quantification stage, which

1 is the only stage relevant to Arch, the trends clause
 2 applies.

3 Now, my Lords, the FCA has sought to persuade this
 4 court that there are implied restrictions on what can
 5 qualify as a trend or circumstance, even though the Arch
 6 trends clause requires reference to any trend or
 7 circumstance. On Day 2 at page 136 of the transcript
 8 {Day2/135:20}, Lord Hamblen asked Mr Edelman to explain
 9 how, as a matter of construction, the trends clause may
 10 be read so as to exclude as a trend or circumstance
 11 something which is connected to the peril and to limit
 12 trends or circumstances to extraneous things in the
 13 world which would have affected the business.

14 We respectfully submit that the FCA has no
 15 satisfactory answer to that point. The FCA's reading of
 16 the trends clause seeks to insert qualifications or
 17 limitations which are simply not there.

18 There was a reference to the Hickmott book and the
 19 suggestion that there was some settled meaning of the
 20 trends clause amongst loss adjusters at least prior to
 21 2010 when Orient-Express was decided, some alleged
 22 settled meaning or practice which was not known to the
 23 three members of the tribunal in Orient-Express, one of
 24 whom was an insurance market practitioner, nor to the
 25 court, nor to the parties, nor to their advisers and nor

1 presumably to their experts. This settled meaning is
 2 supposedly that the trends clause does not include
 3 something which is connected to the peril and the
 4 suggestion is that Orient—Express was decided in
 5 ignorance of that settled meaning or practice.
 6 But in our respectful submission, the Hickmott
 7 extracts which you've been shown do not bear anything
 8 like the weight which Mr Edelman sought to place on
 9 them. Hickmott is not a legal test. The book doesn't
 10 appear to have been referred to in any of the cases. It
 11 doesn't form of the admissible factual matrix, and it
 12 doesn't represent admissible evidence of market
 13 practice.
 14 More generally, Hickmott is concerned with the
 15 position where wide area damage, as well as damage to
 16 insured property, is caused by a storm and certainly for
 17 prevention of access clauses, such as the Arch clause,
 18 there is no wide area damage analogy which can sensibly
 19 be drawn. One could only draw the analogy if one made
 20 the elementary mistake of assuming that in our case the
 21 disease is the peril, but it's not. Our peril is
 22 prevention of access to the premises, not the disease
 23 and therefore our trends clause requires the application
 24 of a "but for" test to exclude the non—access—related
 25 effects of the disease. In other words, the effects

1 which would have been suffered if the premises had
 2 remained open.
 3 Finally, in my allotted time a few minutes on
 4 responding to ground 1 of the FCA's appeal, and this
 5 obviously does not arise if Arch has succeeded on its
 6 appeal and I think that that is common ground.
 7 Ground 1 is an attempt by the FCA to extend the
 8 impact of the counterfactual case which prevailed in the
 9 court below, and in his submissions Mr Edelman ran
 10 grounds 1 and 2 together, but ground 2 does not apply to
 11 Arch because, as you know, the Arch clause is triggered
 12 by government advice recommending closure as well as
 13 government action requiring closure. Therefore, we do
 14 invite the court to treat in ground 1 separately from
 15 ground 2 and not to allow the FCA's points on ground 2
 16 to cloud the analysis on ground 1.
 17 I don't have time to invite you to look at the
 18 declaration the subject of ground 1 of the FCA's appeal.
 19 It's at {C/1/7} and it's paragraph 11.4(c). There's no
 20 appeal from 11.4(a) or (b).
 21 Declaration 11.4(c), the one that's challenged by
 22 ground 1, refers to a measurable downturn in turnover
 23 prior to the operation of the insured peril and we
 24 submit that assuming that there is a measurable downturn
 25 in turnover prior to the operation of the insured peril,

1 declaration 11.4(c) is correct in principle and that we
 2 are entitled to take that into account when adjusting
 3 claims.
 4 A measurable downturn in turnover caused by the
 5 emergency in the weeks before the operation of the
 6 insured peril is plainly a trend which has affected and
 7 is affecting the business before the operation of the
 8 insured peril, in our case the government action or
 9 advice requiring closure. One can test this again by
 10 reference to Lord Briggs' example of the travel agent.
 11 It would offend common sense, of which Mr Edelman
 12 professes to be so fond, as well as contradict the terms
 13 of the trends clause to suggest that the downward trend
 14 before the insured peril operates should be ignored. It
 15 would offend common sense and be contrary to the trends
 16 clause to allow the travel agent to recover its 2019
 17 level of turnover whilst it's closed.
 18 The downward trend pre—peril is therefore a trend
 19 which on the face of the trends clause plainly should be
 20 taken into account when adjusting the loss. It means
 21 that the loss, once the peril occurs, is assessed by
 22 reference to the actual experience of the business at
 23 the commencement of the indemnity period or, as on the
 24 FCA's case, the loss is to be measured by reference to
 25 a completely notional pre—indemnity period experience of

1 the business. That is not sensible and it is not what
 2 the trends clauses provide for. We made the point in
 3 our — I'm sorry.
 4 LORD BRIGGS: It seems to me that there is a (inaudible)
 5 battle going on. As I understand it, you and Mr Edelman
 6 both accept that if the pre—trigger downturn in relation
 7 to a prevention of access clause is some other economic
 8 consequence of the pandemic, then it doesn't get
 9 stripped out of the counterfactual, I think that's
 10 Mr Lockey's concession by reference to the travel agency
 11 example. But if the pre—trigger downturn is in fact
 12 an access—related downturn, in other words it's the
 13 chilling effect of COVID on people coming to the
 14 premises in advance of a government restriction, then it
 15 should be stripped out of the counterfactual. That
 16 seems to be what Mr Edelman is suggesting.
 17 I just wonder whether the difference between you
 18 isn't more about how you draft a declaration which
 19 captures that distinction, rather than one side saying
 20 "You strip out COVID for all purposes" and the other
 21 side saying "You don't strip it out for any purposes".
 22 MR LOCKEY: Well, my Lord, I'm running out of my allotted
 23 time so I'm not going to be able to respond in full on
 24 that.
 25 What I would respectfully suggest is that

1 Mr Edelman's suggestion or concession, if such it be,
 2 undermines completely his case on the trends clause
 3 because on any view the emergency is not, on his case,
 4 extraneous to the insured peril .
 5 Anyway, I'm afraid I have to pass on now to the next
 6 insurer in line. I would like to assist your Lordships
 7 further and I'm sure I could assist your Lordships
 8 further, but time doesn't permit and obviously I have to
 9 rest on my written documents.
 10 LORD REED: Yes. Well, we understand. Thank you,
 11 Mr Lockey.
 12 I think we turn next to Mr Gaisman.
 13 Submissions in reply by MR GAISMAN
 14 MR GAISMAN: My Lords, I have 20 minutes. First, the Hiscox
 15 appeal, three short topics. The first one is Hiscox 4,
 16 judgment paragraphs 112 and 418 {C/3/69}, {C/3/149}.
 17 Members of the court have asked questions about
 18 whether the analysis in 112, the thousands or millions
 19 of proximate causes, should be adopted and others will
 20 address that.
 21 But as your Lordships know, as regards Hiscox, there
 22 is a specific reason why it should not. As I mentioned
 23 in opening, we have a clear finding in our favour in
 24 judgment paragraph 418 {C/3/149}.
 25 Now, my learned friend for the FCA gave an answer on

1 Day 3, pages 84 to 85 {Day3/84:22}, {Day3/85:3} to my
 2 Lord Lord Hamblen's question about this paragraph to the
 3 effect that all the judges were saying in 418 was, well,
 4 and I quote:
 5 "... if you have all these pins on the board, if you
 6 take one pin out, it's not going to make any
 7 difference."
 8 My Lords, they were not saying that. They were
 9 saying that what occurred within the one-mile radius was
 10 simply not causative of the restrictions and the court
 11 was accepting the submission which Hiscox made, which
 12 they recorded at the end of judgment paragraph 403
 13 {C/3/145}. And there is a further point in relation to
 14 this.
 15 Judgment para 112 {C/3/69} is reflected in
 16 declaration 10 {C/1/6}. Now, your Lordships do not yet
 17 know, but I am telling your Lordships now, that there
 18 was a dispute between the FCA and Hiscox after the
 19 consequential hearing about whether declaration 10
 20 should or should not include Hiscox 4. That dispute was
 21 referred to the court and the court ruled in Hiscox's
 22 favour. That is why this declaration does not include
 23 Hiscox and is confined to the disease clauses.
 24 The second topic is "but for" causation and Hiscox.
 25 Now, again others will address this topic more generally

1 but as regards the Hiscox wordings, there is no issue or
 2 there was no issue that one applies "but for" reasoning
 3 both to the main insuring clause and to the
 4 counterfactual -- and to the trends clause, the court
 5 below so held in the most unequivocal terms in
 6 paragraph 278 {C/3/114}. Nowhere has the FCA complained
 7 about that holding or criticised or said the court was
 8 wrong in that paragraph.
 9 If it is now said, as regards some insurers, that
 10 "but for" causation should in some way not apply, that
 11 cannot be so for Hiscox, not only for the reasons just
 12 given but also because the Hiscox policies only insure
 13 against loss solely and directly caused or solely and
 14 directly caused by interruption, which is D in my chain
 15 A-B-C-D, and that interruption has itself, of course, to
 16 be caused by A-B-C. This is our ground of appeal 4.
 17 I mention this point now, although it's in our case
 18 at paragraphs 97 to 100 of our appeal case, because
 19 I had thought that this appeal was proceeding on the
 20 basis of judgment paragraph 278 {C/3/114} and as we
 21 pointed out in our appellant's case, paragraph 26, the
 22 FCA explicitly stated below that it was not seeking to
 23 disapply "but for" causation.
 24 But the words "solely and directly" put this issue,
 25 at least as regards Hiscox, beyond dispute. The FCA's

1 respondent's case para 224.1 accepts that the words
 2 "solely and directly" imposes a stricter test than
 3 proximate cause.
 4 The effect of such a provision was considered by my
 5 Lord Lord Hodge in the McCann's Executors v Great Lakes.
 6 Just for the reference, we haven't got time to look at
 7 it, {E/43/1196}: see especially paragraphs 16 to 17, 25
 8 and 28. The effect in that case and generally is that
 9 where a loss is concurrently caused by two proximate
 10 clauses A and B but the policy only insures against loss
 11 caused solely by A, there is no cover. So the effect of
 12 this provision is to cement the "but for" test in the
 13 analysis and the words "solely and directly" make any
 14 debate about "but for" and other possible proximate
 15 clauses irrelevant because only losses solely caused by
 16 an interruption itself caused by A-B-C are covered and
 17 that applies both generally but also to the causation
 18 issue within the coverage question on Hiscox 4.
 19 Thirdly and finally on the Hiscox appeal, the role
 20 of the disease in the counterfactual. My Lords, the FCA
 21 continues to say that it finds our case on this
 22 incomprehensible. We illustrated it in our appellant's
 23 case, paragraph 53, with the pipeline example. The
 24 point is simply this: Hiscox's indemnity does not extend
 25 to the uninsured effects of the disease, represented in

1 that example by pipelines X, Y and Z, but that sounds
 2 axiomatic. We don't insure uninsured effects. But that
 3 is what is meant by saying that the disease is removed
 4 insofar as it causes the restrictions imposed and it
 5 really comes down to two points, my Lords, which I would
 6 like to leave with your Lordships on this.

7 First, what is your Lordships' judgment on our 13th
 8 chime point? Perhaps that's a slightly question begging
 9 way of putting it but it identifies the point. How can
 10 a public authority clause require underwriters to
 11 indemnify in respect of losses not caused by public
 12 authority restrictions? That's the first question
 13 I leave with your Lordships.

14 The second question I leave with your Lordships is
 15 this: who is right on this question? Is this
 16 an insurance against rats or drains, et cetera, or
 17 disease, provided only that there is public authority
 18 action, or is this an insurance against certain
 19 consequences of public authority action provided that
 20 the reason for that action is one of the causes stated
 21 in sub-clauses (a) to (a).

22 If we're right on that question -- and my learned
 23 friend said very little about that debate -- if we're
 24 right on that, it cannot be right to remove anything
 25 wider than the consequences of the public restrictions

1 caused by the disease.

2 My Lords, I turn to the FCA's and HAG's appeal.
 3 Restrictions imposed. Now, my Lords, listening to my
 4 learned friend Mr Edelman's Through the Looking-Glass
 5 submissions yesterday one might have forgotten three
 6 things.

7 First, that the question is: what is the true
 8 construction of the words "inability to use due to
 9 restrictions imposed" in Hiscox1 to 4? Do they refer to
 10 legal restrictions imposed or something wider and, if
 11 so, what?

12 Secondly, this question is to be viewed as at the
 13 date of the contract. It is a question of the parties'
 14 original intentions. Obviously not with the benefit of
 15 hindsight.

16 One doesn't start, as my learned friend did, with
 17 Prime Minister's 16th March speech and ask which bits of
 18 it were mandatory in the special coinage that the FCA
 19 gives that word?

20 Thirdly, the concept of mandatoriness is nowhere in
 21 the contract save in its usual sense meaning that which
 22 is either required or prohibited by law.

23 Now, my Lords, nothing that my Lord Lord Leggatt
 24 said in Equitas, if I may respectfully say so, requires
 25 one to do other than examine the presumed intention of

1 the parties as at the date of the contract.

2 Now, let's go back to that point. The idea of the
 3 government ordering people what to do in a non-legal way
 4 would not have been familiar to the contracting parties,
 5 nor would the concept of restrictions imposed other than
 6 by authority of law. If someone had asked the parties
 7 at the time of contracting, "Do you contemplate the
 8 possibility of restrictions imposed by a public
 9 authority causing an inability to use other than by
 10 operation of law?" I respectfully suggest that their
 11 answer would have been, "Of course not. What sort of
 12 country do you think we live in?" Or, to use the
 13 language of Lord Hope in the Lloyds TSB case, the
 14 meaning that my learned friend Mr Edelman puts on these
 15 words is a meaning that no reasonable person would have
 16 dreamed of giving them at the time.

17 It is common ground that the wordings in this
 18 case -- the meaning of the wordings -- and the wordings
 19 themselves should be clear and readily applicable in the
 20 real world. The court below provided a readily
 21 comprehensible test. I respectfully suggest that
 22 policyholders and insurers would be utterly bemused by
 23 the FCA's proposed test, which actually has been
 24 introduced in to order deal with a completely different
 25 concern which the FCA has about the interaction of this

1 point with the trends clause.

2 The test between what is permitted by law and what
 3 is forbidden by law is not only a readily comprehensible
 4 test, it is one that every inhabitant of this country
 5 has to live by every day of their lives, insured or
 6 uninsured. This has got nothing to do with insurance.
 7 Everybody under the present lockdown has to know what
 8 they're legally prohibited from doing.

9 My Lords, I hope it's not too old-fashioned to
 10 engage in a little bit of textual exegesis, although
 11 there was not very much of it in my learned friend's
 12 submissions. The words are "restrictions imposed
 13 producing an inability to use". Whatever the ambit of
 14 the inability that the insured must prove -- I leave
 15 that, that's a separate point -- it has to be
 16 an inability.

17 Now, restrictions that do not have the force of law
 18 do not create an inability because compliance is
 19 a matter of choice. In our country, an insured may do
 20 what it likes with its premises and if it's unable to
 21 that, it's because it is prevented by law from doing so.

22 My Lords, social responsibility is a laudable thing
 23 but it cannot create an inability to use. Similarly,
 24 perhaps I don't need to apologise, I almost feel I do,
 25 for looking at the natural and dictionary meanings of

1 the words used. We all know what "imposed" means, and
2 it's not an accident that it does. As we point out in
3 our respondent's case, the fact in the clause that the
4 imposer is stated to be a public authority that has
5 power to impose the stated restrictions refers to -- my
6 Lord.

7 LORD LEGGATT: You're no doubt right, Mr Gaisman, that
8 nobody at the time the policy was drafted expected that
9 the Prime Minister would come on television and order
10 people to do things without at the time a legal basis
11 for that. But it's unrealistic, isn't it, to expect the
12 policyholder, who watches that broadcast, to say, "Oh
13 well, it's all very well for you to say that, Prime
14 Minister, but unless and until the law is changed, I'm
15 going to carry on business as usual." That's just an
16 unreasonable way to expect a policyholder to react.

17 MR GAISMAN: Well, my Lord, there are two views about that.
18 A struggling business that needs all the income it can
19 get would not, I respectfully suggest, be open to
20 criticism for staying open until it was required to
21 close. But in any event, my Lord, the question is
22 what -- one has to attribute a test to the parties --
23 an intention to the parties as at the date of
24 contracting. And if the natural intention at that stage
25 would be to distinguish between what is required by law

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1 and what is not required by law, as I suggest it would
2 have been, then that test is what carries forward into
3 the future.

4 LORD LEGGATT: But it's not right to proceed on the basis
5 that the parties wouldn't have thought of this
6 situation, therefore it's not covered. You have to take
7 the situation that has happened, the broadcast that is
8 made, and say: what should the parties be taken to have
9 intended the words to mean when applied to this
10 situation, which has occurred?

11 MR GAISMAN: Well, my Lord --

12 LORD LEGGATT: You say your approach is consistent with what
13 Lord Justice Chadwick said, but it seems to me it's not.

14 MR GAISMAN: Well, it's consistent, my Lord, with what
15 Sir Thomas Bingham said, and the difference between the
16 implication of a term and the matter of construction is
17 an irrelevant difference when it comes to the extent to
18 which you interpret the contract in the light of events
19 which has occurred.

20 But all I would do in perhaps the limited time
21 I have is to quote to my Lord Lord Leggatt what my Lord
22 said yesterday at page 134 {Day3/133:18} because -- and
23 in a sense I'm moving on to a slightly different
24 question, a question of practicality. Your Lordship
25 said:

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1 "... if we were to rule that the
2 P[rime] M[inister]'s statement was mandatory that might
3 be a bit too broad without looking at particular
4 language of particular parts of it and looking at
5 particular effects, or how they might be reasonably
6 understood by particular business sectors."

7 Now, this is not this stuff, this speech, my Lord,
8 of the clause at all. Let me give your Lordship two
9 examples taken from the Prime Minister's speech. The
10 only mention of restaurants in the Prime Minister's
11 speech on 16 March is London restaurants. Is this
12 a mandatory statement as regards restaurants not in
13 London? What is London?

14 Second point. Some business subsequently ordered to
15 close were not mentioned at all in the Prime Minister's
16 speech on 16 March, such as beauty salons.

17 So we have a situation where the restrictions were
18 imposed on 16 March depends on this Prime Minister's
19 notorious taste for euphemy. Now, these are totally
20 quixotic results. It cannot possibly have been
21 intended, even if one attributes the very generous
22 dollop of hindsight which I respectfully suggest is
23 being posited.

24 Then we have another issue, my Lord. The reasonable
25 impartial observer, because somebody's got to work

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1 out -- not what the law is, which everybody has to do --
2 but what something means. We have to parse the modal
3 verbs, we have to cope with the fact that different
4 ministers may say different things on different days in
5 different language, and we have to accept that the
6 libertarian and the valetudinarian will have
7 a completely different approach to the question of what
8 something either means or should be taken to mean.
9 Although I understand the circumstances in which the
10 first lockdown was imposed, I do very respectfully urge
11 that taking too a narrow view of what is socially
12 responsible without recognising that people are entitled
13 to do that which they are not legally prevented from
14 doing would be a mistake, because in fact what
15 your Lordships are -- or what my Lord Lord Leggatt in
16 a sense is putting to me is that the contract should be
17 interpreted in a way which ascribes a legally inaccurate
18 understanding of the position to the parties. Because
19 if the parties had understood the position correctly,
20 they would have realised that there were no restrictions
21 imposed by law.

22 My Lord, I see that in my enthusiasm to answer
23 your Lordship's question, I've practically done myself
24 out of my remaining time. So all I think I can do now,
25 I need to move on to inability to use, but we've managed

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1 to debate "inability to use" over two days, some part of
 2 two days, without actually looking at what the judgment
 3 below said on this. It's paragraph 268 at {C/3/112}.

4 This is what this appeal is about, my Lords, on this
 5 point. Because the judgment on this paragraph, which
 6 I have a particular pleasure in quoting since it
 7 reflects the submissions that we made below, unlike some
 8 other paragraphs, and this is what this is about. Did
 9 the judges below get this wrong?

10 Now, if I had time, which I don't, I would read this
 11 paragraph to your Lordships and I would commend it to
 12 your Lordships, because a great deal of the target that
 13 my learned friends have been aiming at has been the
 14 wrong target. All I am seeking to do is to uphold this
 15 paragraph of the judgment. Lord Mustill always used to
 16 say if you asked a rhetorical question you were in
 17 danger of getting a rhetorical answer, so I will avoid
 18 that and simply say there's nothing wrong with
 19 paragraph 268.

20 My Lords, I think I'm out of time.

21 LORD REED: Thank you very much, Mr Gaisman.

22 Now I think we're going to hear for the first time
 23 from Mr Orr on behalf of Zurich.

24 Submissions by MR ORR

25 MR ORR: My Lords, can you see me and hear me?

1 LORD REED: Yes, perfectly, thank you.

2 MR ORR: My Lords, I have 15 minutes to present Zurich's
 3 submissions. Zurich is concerned only with two of the
 4 FCA's grounds of appeal, namely the force of law and
 5 total closure points; that is grounds 2 and 3.

6 There are two Zurich wordings in issue. They are in
 7 materially similar form. They are both prevention of
 8 access wordings. Could I take your Lordships to that
 9 wording as it appears in the Zurich 2 policy. That is
 10 the policy that is quoted in the judgment. It is at
 11 {C/19/1448}.

12 My Lords, if I can start about a quarter of the way
 13 down, your Lordships will see the stem wording:

14 "Additional cover extensions applicable to
 15 Sub-section B1 — Business interruption 'all risks'
 16 "Any loss as insured under this section resulting
 17 from interruption of or interference with the business
 18 in consequence of ..."

19 And then it's (b):
 20 "Any of the under-noted contingencies.
 21 "will be deemed to be an incident" and as
 22 an incident within the scope of cover.

23 The first extension is the action of competent
 24 authorities clause. This is the extension which is the
 25 subject matter of the FCA's claim against Zurich. We

1 describe it as "the AOCA extension". That's how it was
 2 referred to below.

3 The keywords, your Lordships see, are:
 4 "Action by the police or other competent local,
 5 civil or military authority following a danger or
 6 disturbance in the vicinity of the premises whereby
 7 access thereto will be prevented ..."

8 There are two other extensions which are relevant to
 9 interpretation of the AOCA extension. First, on the
 10 next page, that's 1449 {C/19/1449}, the
 11 "Notifiable diseases" extension. Your Lordships see
 12 there the description of the contingency:
 13 "Loss resulting from interruption of or interference
 14 with the business at the premises resulting from"
 15 various matters, including the "occurrence of
 16 a notifiable disease at the premises ... which causes
 17 restrictions on the use of the premises on the order or
 18 advice of the competent local authority."

19 The second extension that I want to draw
 20 your Lordship's attention to is the prevention of access
 21 extension on the following page, 1450 {C/19/1450}, and
 22 there the contingency is described as:
 23 "Property in the vicinity of the premises damage to
 24 which will prevail or hinder the use of the premises or
 25 access there to, whether your premises or property

1 therein sustain damage or not ..."

2 Your Lordships will note the draftsman's use in
 3 those two further extensions of the phraseology
 4 "restrictions on the use of the premises", the phrase
 5 "order or advice" as opposed simply to "action" in the
 6 AOCA extension, and the reference to matters which
 7 hinder access to premises and matters which prevent or
 8 hinder the use of the premises.

9 Now, my Lords, the court below found that the AOCA
 10 extension did not respond to the measures introduced by
 11 the government in response to the COVID-19 national
 12 pandemic. The court found that the AOCA extension
 13 provided narrow, localised cover intended to cover
 14 dangers occurring in the locality of the insured's
 15 premises. The court concluded that this cover was not
 16 triggered by the government action responding to the
 17 national pandemic, because that action was not caused by
 18 and hence did not follow any danger or disturbance that
 19 was specific to the locality of an insured's premises.

20 That conclusion is not challenged by the FCA. The
 21 FCA's appeal will not therefore affect the outcome of
 22 these proceedings against Zurich. The FCA has
 23 nevertheless chosen to appeal the court's findings as to
 24 the meaning of the terms "action" and "prevention of
 25 access" in the Zurich wordings, and I turn to those

1 points now. I deal first with prevention of access.
 2 The court found --
 3 LORD LEGGATT: Can I just ask, Mr Orr --
 4 MR ORR: Yes, of course.
 5 LORD LEGGATT: -- does this point have any bearing for the
 6 real world because of some other situations that arise
 7 or is it just an abstract question that we're being
 8 invited to decide to add to all the other important real
 9 questions?
 10 MR ORR: My Lord, so far as Zurich is concerned it is
 11 abstract. The phrase "prevention of access" appears
 12 also in Arch's wording and I will come to that. So it
 13 has effect in relation to another insurer's wording.
 14 So far as the meaning of the word "action" is
 15 concerned, I think I'm right, but I will be corrected if
 16 I'm wrong, that that is purely academic; in that it
 17 appears in the Zurich wording and also in MS Amlin's
 18 MSA1 wording. But, again, that wording is wording in
 19 respect of which the court below found in favour of
 20 MS Amlin and again the FCA, I think I'm right in saying,
 21 doesn't actually challenge the outcome of the case in
 22 respect of that particular wording.
 23 So, my Lord, so far as action is concerned, the
 24 short answer to your Lordship's question is yes and,
 25 indeed, that is a reason that we would pray in aid for

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1 this court to be cautious about overturning the court
 2 below's decision on the meaning of "action", at least as
 3 it applies in relation to the Zurich policies.
 4 My Lords, so far as prevention of access is
 5 concerned, the court below found in relation to the
 6 Zurich wording that access to premises is prevented
 7 where the premises have been totally closed for the
 8 purposes of carrying on the insured's business. As in
 9 the case of Arch, in the context of the Zurich policies,
 10 the business in question is the business stated in
 11 policy. That is the insured's pre-existing business.
 12 Zurich submits that the court's construction of the
 13 phrase "prevention of access" is correct. The FCA's
 14 contention that partial prevention should also count as
 15 prevention of access is wrong, we submit, and on this
 16 issue we gratefully adopt the submissions made by
 17 Mr Lockett on behalf of Arch.
 18 I make only at this stage the following short
 19 points.
 20 First, we submit that the language of the AOCA
 21 extension is clear and unambiguous, cover is triggered
 22 where access is prevented, nothing less will do.
 23 Partial prevention of access may amount to hindrance of
 24 access to the premises or possibly hindrance on the use
 25 of the premises. However, neither of those suffices for

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1 the purposes of the Zurich AOCA extension. Neither
 2 hindrance nor use of the premises is referred to in the
 3 AOCA extension, whereas they are referred to in the
 4 notifiable diseases and prevention of access extensions.
 5 The choice of different language in these provisions
 6 should, we submit, be taken to be deliberate.
 7 The second point I would note is that the
 8 construction adopted by the court below accords with the
 9 genesis of action of competent authority extensions,
 10 such as those found in the Zurich policies. These
 11 extensions arose out of terrorist activity in the UK in
 12 the 1980s and 1990s which involved devices that did not
 13 explode, not just those that did explode, so that
 14 traditional business interruption cover contingent on
 15 property damage did not respond.
 16 That is explained by Riley on Business Interruption
 17 Insurance in a passage cited in the judgment at
 18 paragraph 489 {C/3/167}.
 19 So the paradigm situation contemplated by these
 20 extensions is one where a particularly dangerous
 21 situation, such as a bomb scare or other incident,
 22 require the police or other emergency responders to
 23 cordon off or otherwise prevent access to premises that
 24 are believed to be dangerous. In this regard it should
 25 be noted, my Lords, that police cordons have the force

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1 of law. As the court below correctly observed,
 2 individuals other than those permitted to go through
 3 a cordon, such as emergency workers, would break the law
 4 if they went through the cordon. A police cordon
 5 therefore constitutes a legal as well as a physical
 6 barrier to accessing premises that are within the
 7 cordon.
 8 My Lords, I note the time. I could finish off
 9 prevention of access before lunch, or --
 10 LORD REED: I think it might be better if we adjourn just
 11 now and we can sit again at 2 o'clock.
 12 MR ORR: I am obliged, my Lords.
 13 (1.01 pm)
 14 (The luncheon adjournment)
 15 (2.01 pm)
 16 LORD REED: I think we're all ready to resume now. So we
 17 will return to Mr Orr. Mr Orr.
 18 MR ORR: My Lords, finally on prevention of access, we echo
 19 Mr Lockett's submission that general restrictions on free
 20 movement, such as those contained in regulation 6 of the
 21 26 March Regulations, did not prevent access to premises
 22 within the meaning of the AOCA extension. We submit
 23 that the court below was correct on this point for the
 24 reasons it gave in paragraphs 328 and 329 of the
 25 judgment {C/3/127}.

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1 It follows, we submit, that the court below rightly
2 found that there was no prevention of access to premises
3 in the case of businesses that were permitted by the
4 March Regulations to remain open and that includes
5 category 3 and category 5 businesses which account for
6 87% of the policyholders of the Zurich policies in issue
7 in these proceedings.

8 My Lords, I then turn finally to the meaning of
9 "action". Zurich submits that the court below was
10 correct to find that the word "action" in the AOCA
11 extension connotes steps taken by a competent authority
12 which have the force of law. On this point, Zurich
13 relies on the submissions made by MS Amlin and Hiscox on
14 the force of law issue, as well as the points made in
15 Zurich's own written case. I make the following brief
16 points at this stage.

17 First, the narrow meaning to be ascribed to the term
18 "action" in the AOCA extension is apparent, we submit,
19 when the extension is read in the context of the Zurich
20 policies. The AOCA extension does not refer to advice,
21 in contrast to the phrase "order or advice of the
22 competent local authority" which is the trigger for
23 cover under the notifiable diseases extension. The
24 draftsman's choice of words should be taken to be
25 deliberate.

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1 Second, in the context of the AOCA extension, the
2 term "action" is naturally read as connoting steps which
3 have the force of law because only such steps prevent
4 access to premises. Guidance or advice which gives
5 an insured the option of complying does not have that
6 effect.

7 Third, the construction adopted by the court below
8 promotes commercial certainty. The FCA's contention
9 that "action" encompasses not only actions which have
10 the force of law but also instructions expressed in
11 mandatory terms is a recipe for uncertainty and dispute.

12 Fourth, the FCA's arguments are, we submit, driven
13 by hindsight. That is wrong in principle. The policies
14 must be construed by reference to the background
15 knowledge that would reasonably have been available to
16 the parties at the time of the contract.

17 Finally, my Lords, a brief word on Mr Edelman's
18 argument trying to link the force of law point to the
19 FCA's first ground of appeal, namely the pre-trigger
20 downturn point.

21 Mr Edelman argues that when these two points are
22 combined, the construction adopted by the court below
23 would reduce policyholders' claims to zero, even though
24 cover was subsequently triggered by legislation having
25 the force of law.

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1 Now, Zurich is not concerned with the first ground
2 of the FCA's appeal. Nevertheless, to the extent that
3 such an argument is relied upon to construe the AOCA
4 extension in the Zurich policies, Zurich makes clear
5 that it does not suggest and never has suggested that
6 closure of a business in the period immediately
7 preceding the introduction of legislation by the
8 government, for example on 20 March in advance of the
9 21 March regulations, would of itself establish a trend
10 that a loss adjuster could use to adjust
11 a policyholder's claim to zero.

12 Mr Edelman's argument to that effect focuses on the
13 short periods of time between, first, the announcement
14 issued by the government on 20 March and the regulations
15 introduced on 21 March and, second, the announcement
16 issued by the government on 23 March and the regulations
17 introduced on 26 March.

18 From Zurich's perspective, the notion that loss of
19 revenue during those periods would be relied upon by
20 a loss adjuster to reduce a claim that was covered by
21 a policy to zero is fanciful. This, in our submission,
22 is unjustified scaremongering.

23 The argument is also unsupported by any evidence.
24 There is no evidence before this court and there was
25 none below suggesting that loss adjusters would approach

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1 the establishment of a trend in the way now alleged by
2 the FCA.

3 The pre-trigger downturn point does not therefore
4 support the FCA's argument as to the proper meaning of
5 the term "action" in the Zurich AOCA extension.

6 LORD REED: May I just ask for clarification, Mr Orr? Are
7 you restricting your submission to establishing a trend
8 reducing the loss to zero or are you making a wider
9 point that it wouldn't be relied on as establishing
10 a trend at all?

11 MR ORR: No, my Lord, no, it would be part and parcel of the
12 circumstances that would need to be taken into account,
13 but I am responding to Mr Edelman's in terrorem
14 argument that it would have the effect which he said
15 would be to reduce policyholders' claims to zero.

16 LORD REED: Yes. So it might reduce the loss to some
17 extent?

18 MR ORR: Indeed, but on the face of it not a significant
19 extent because a trend is something that happens over
20 a period of time. My Lords, so that was all I was going
21 to say, unless I can assist your Lordships further and
22 we submit, for the reasons I've given, grounds 2 and 3
23 of the FCA's appeal should be dismissed.

24 LORD REED: Thank you very much, Mr Orr.

25 Now I think it's now time for Mr Kealey to go over

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1 the top, as he put it.
 2 Submissions in reply by MR KEALEY
 3 MR KEALEY: I'm going to hope to stay there, my Lord, and in
 4 fact invade the trenches opposite me successfully.
 5 I'm going to address five to six points in my reply.
 6 I say five to six because it will really depend upon how
 7 interventionist your Lordships are, but I am going to
 8 start quite slowly and probably I will gallop towards
 9 the end.
 10 The first point, my Lords, is quite important. The
 11 gauntlet was fairly and squarely thrown down in front of
 12 Mr Edelman's feet. I think he bent down and tried to
 13 pick it up. If he did, he failed to get up properly
 14 again, my Lord.
 15 The gauntlet was, my Lords, that Mr Edelman had not
 16 come up with any insurance case in this country or
 17 indeed in Scotland where something has been held to be
 18 a proximate cause which however was not a "but for"
 19 cause.
 20 All Mr Edelman can point to are defence costs
 21 authorities, and they simply don't help him. They turn
 22 on the wording of the relevant defence costs expenses
 23 provisions. There is nothing in them that refers to
 24 causation in any way, shape or form. They provide no
 25 support for there being a proximate cause where there is

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1 no "but for" cause. I can take your Lordships and
 2 invite your Lordships to go to the Zurich v IEG case,
 3 a case very close to Mr Edelman's heart since he was in
 4 it. It's at {E/21/494}. It's also a convenient
 5 authority because it refers to New Zealand Forest and
 6 its policy provision. The reason I take you straight to
 7 494 rather than to the beginning because that's where
 8 the relevant defence costs provision exists in the
 9 policy before the court in that case.
 10 As your Lordships see, at paragraph 13 {E/21/494}:
 11 "Each of the Midland policies issued during the
 12 six years when it was on risk provided that ..."
 13 If your Lordships go to the last sentence on that
 14 page:
 15 "The company [that's the insurer] will in addition
 16 pay claimants' costs and expenses and be responsible for
 17 all costs and expenses incurred with the consent of the
 18 company in defending any such claim for damages."
 19 If your Lordships could now turn to page 503
 20 {E/21/503} to paragraph 37 you'll see a similar type
 21 clause in the New Zealand case.
 22 If your Lordships look at paragraph 37:
 23 "As regards defence costs, IEG relies on reasoning
 24 adopted by the Privy Council in New Zealand ..."
 25 If you could go down, my Lords, to letter F:

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1 "This covered 'all loss ... which such officer has
 2 become legally obligated to pay on account of any claim
 3 made against him ... for a wrongful act'."
 4 Both provisions, therefore, depend upon a legal
 5 obligation. The wordings provided, my Lords, a complete
 6 indemnity. I think I've lost -- no, Lord Leggatt's
 7 back.
 8 The wordings provided a complete indemnity. They
 9 compelled one obvious conclusion. The costs having been
 10 incurred by the insured and the insured having incurred
 11 a liability in respect of them for the defence of
 12 covered claims, it was a complete irrelevance that they
 13 might also have enured for the benefit of uncovered
 14 claims.
 15 Your Lordships, I will give you the reference to
 16 paragraph 38 as well {C/21/503}. Even so, my Lords, if
 17 you apply the "but for" test to the clauses, as in
 18 Zurich, would the claimants have suffered the loss for
 19 which they claimed indemnity but for having incurred the
 20 costs and expenses with the consent of insurers in
 21 defending such claim for damages? Of course not. The
 22 answer is no, the "but for" test was satisfied insofar
 23 as it ever needed to be asked.
 24 Whilst we're on Zurich, my Lords, I want also to
 25 point out to your Lordships the relevant paragraphs

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1 which dealt with the insurance fallout, rather like
 2 a nuclear fallout, the insurance fallout of the
 3 departure from the "but for" test in the Fairchild
 4 Enclave. There are certain paragraphs which I will
 5 refer you to and certain paragraphs I will read. Could
 6 I read paragraph 102 at page 525 {E/21/525} in the
 7 judgment of my Lord Lord Hodge.
 8 These are all paragraphs which I cite to you almost
 9 in terrorem. In other words, don't mess around with the
 10 "but for" test unless it is absolutely necessary and
 11 vital so to do and in this case don't. And I'm going to
 12 develop that submission in a more elegant form in
 13 a moment.
 14 Paragraph 102 {E/21/525}:
 15 "I have found this a difficult case, not least
 16 because I am generally averse to developing the common
 17 law other than by the application of general principles.
 18 I have shared the concerns which Lord Neuberger ... and
 19 Lord Reed ... have articulated. But we are where we
 20 are."
 21 And that's a rather sad sentence:
 22 "The law has tampered with the 'but for' test of
 23 causation at its peril: Sienkiewicz v Greif ...
 24 Lord Brown ...[et cetera]. The Fairchild enclave
 25 exists: the courts in Fairchild and Barker and the

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1 'Trigger' litigation, for obvious reasons of policy,
2 have developed a special rule of causation to do justice
3 to the victims of wrongful exposure to asbestos fibres
4 who have contracted mesothelioma as a result. Having
5 done so, the courts must address the consequences of
6 that innovation."

7 For your reference, could you also look at my Lord
8 Lord Hodge at paragraph 109, that's just a reference
9 {E/21/526}; Lord Sumption at 114 {E/21/528};
10 Lord Neuberger and Lord Reed who gave a joint judgment.
11 Could I take your Lordships to paragraph 193 {E/21/564}
12 which your Lordships will find, I think, at page 564 of
13 this bundle.

14 "The creation of an ad hoc exception from
15 established principles governing causation in order to
16 provide a remedy to the victims of mesothelioma was, in
17 the first place, likely to result in certainty as to the
18 legal rationale of the exception (as distinct from the
19 social policy of enabling victims of mesothelioma to
20 obtain a remedy against negligent employers), and the
21 consequent breadth of that exception. The rationale
22 could not be merely the impossibility of establishing
23 the cause of an injury, since such a wide exception to
24 the general rule governing causation would destroy the
25 rule ..."

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1 Can I invite your Lordships to go on and then, as
2 your Lordships see, Lord Brown referred to:
3 "... the unfortunate fact is that the courts are
4 faced with comparable rocks of uncertainty in a wide
5 variety of other situations too, and that to circumvent
6 these rocks on a routine basis would turn our law upside
7 down and dramatically increase the scope of what
8 hitherto have been rejected as purely speculative
9 compensation claims."

10 I think, my Lords, if you go to the last sentence in
11 that paragraph, the last sentence in that paragraph:

12 "Secondly, the introduction of a novel test of
13 causation in tort was bound, given the legal and
14 commercial connections between different areas of the
15 law, to give rise to a series of difficult questions and
16 consequent uncertainty, as the ripples spread outwards."

17 I'm so sorry, my Lords, it was being pointed out to
18 me, something was being pointed out to me, and I didn't
19 know it was you.

20 LORD LEGGATT: That's fine, Mr Kealey, I was waiting until
21 you had got to a good point in the passage. What
22 I wanted to suggest to you is that the problem in
23 Fairchild and other such cases is not the application of
24 the "but for" test, it wasn't a case in which there were
25 multiple causes that would be sufficient to result in

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1 loss, the problem was that in that enclave, although
2 it's put politely as a weak test of causation, actually
3 what happened was that the need to prove any causal link
4 between the particular negligence and the loss was
5 abrogated and that's not --

6 MR KEALEY: Yes.

7 LORD LEGGATT: -- your problem, it's just a case of
8 dispensing with causation and satisfying yourself with
9 an increased risk which doesn't amount to a causal link.

10 MR KEALEY: Well, it depends again on your perspective.
11 Professor Jane Stapleton would say that an increased
12 risk is a causative connection. Professor Lord Burrows
13 would disagree, my Lord, with that but neither of those
14 two persons is here.

15 But certainly in that case it might be said that no
16 causal link could be proved although there possibly was
17 a causal link at least one tortfeasors actions and
18 indeed the disease.

19 LORD LEGGATT: (Inaudible)

20 MR KEALEY: In relation to the "but for" -- I'm so sorry,
21 was your Lordship going to say something?

22 LORD LEGGATT: No, I was just agreeing with that
23 proposition.

24 MR KEALEY: In relation to the "but for" test, dare we say
25 it, the causative link cannot be proved either because

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1 unless you have A causes B, B is not caused by A. So
2 it's an even more fundamental point.

3 In fact, the Fairchild Enclave at least had one
4 tortfeasor who did something which was causative of the
5 victim's of mesothelioma. In our case, if you ask the
6 question which I'm going to repeat ad nauseam until you
7 tell me to shut up, which is: did the peril insured
8 against cause the loss? The answer is no, there was no
9 cause as a result of the insured peril. There was
10 a cause, if you're an epidemiologist there was a cause
11 and the epidemiologist can investigate the cause, but in
12 terms of the contractual question --

13 LORD LEGGATT: You say, do you, Mr Kealey, in the case, of
14 two fires each started off and the house gets burnt
15 down, this is a Hart and Honoré example, and either fire
16 on its own would have been sufficient to burn the house
17 down but two were started, but you say neither fire
18 caused the loss; that's what you say, is it?

19 MR KEALEY: Absolutely not, my Lord. That's a terrible
20 example. It's a case of two wrongdoers each of which
21 causing a fire and the fire burns down the building in
22 circumstances where if there had been one wrongdoer the
23 victim of the fire would have recovered, but in
24 circumstances where there's a proliferation of
25 wrongdoers, the law seems to think or the "but for" test

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1 seems to think that there is no wrongdoer. That is so
 2 absurd that the law in the case of tort as a policy
 3 reason in the case of two wrongdoers makes an exception.
 4 LORD LEGGATT: Well, let me dispense with wrongdoers.
 5 There's a strike of lightning which starts a fire and
 6 a wrongdoer also starts a fire, if you like. We don't
 7 say that the lightning wasn't a cause of the burning
 8 down because it would have burnt down anyway or
 9 (inaudible due to overspeaking).
 10 MR KEALEY: Well, actually —
 11 LORD LEGGATT: (Inaudible due to overspeaking) caused it.
 12 MR KEALEY: No, I'm sorry, my Lord, Professor Lord Burrows
 13 would tell your Lordship that in the answer to that
 14 particular example the natural cause has resulted in the
 15 fact that the unnatural cause is no longer a cause at
 16 all. If your Lordship looks at Lord Burrows' book on
 17 causation, he will say that if there is a human-made
 18 cause and a natural cause and the loss would not have
 19 occurred but for the natural cause, then the person who
 20 would be the tortfeasor has no liability as a result of
 21 the natural cause as it were intervening.
 22 LORD LEGGATT: So, what, neither did cause the loss in that
 23 example?
 24 MR KEALEY: No, absolutely not. Because again you're doing
 25 the wrong thing, dare I say it, my Lord. You're asking

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1 the wrong question. Did the wrongdoer cause the fire?
 2 The answer is no. No, because but for the wrongdoing,
 3 the fire still would have occurred.
 4 My Lord, I hate to say this because I can debate
 5 this with your Lordship for probably the next 2 hours
 6 and I just don't have the time, and actually that's
 7 a very important point, my Lord.
 8 Could your Lordship, just for your reference, the
 9 Carslogie case {F/14/229}; Mr Justice Hamblen's analysis
 10 in the Orient at {E/31/928}; see Clarke {F/60/1292};
 11 MacGillivray {E/51/1453}, footnote 27.
 12 Now, the concern I have, my Lords, and I'm going to
 13 have to jump in and really dash now and so I'm now
 14 becoming more — I am now at a gallop, my Lord, and
 15 I might actually lose control in a moment and come off,
 16 but it doesn't matter.
 17 LORD LEGGATT: I will respond to your request not ask any
 18 more questions, Mr Kealey, and give you a free run for
 19 the last furlong.
 20 MR KEALEY: Well, I hope it's longer than a furlong, my
 21 Lord.
 22 Anyway Mr Edelman refers to Galoo and the Australian
 23 cases referred to in it. You have to read them very
 24 carefully. I'm sorry they don't say what Mr Edelman
 25 suggests. They don't say "but for" causation is

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1 unnecessary, only that it's insufficient.
 2 My Lord, I've got a very important point to make
 3 which I'm now going to rush through, if I may.
 4 Your Lordships — that is to say my Lord
 5 Lord Leggatt — has been postulating quite often the
 6 concept of two concurrent independent causes, despite
 7 everything I say about "but for", you're throwing me out
 8 with the bathwater, as it were.
 9 If you discard the "but for" test in a contractual
 10 context, you discard the need for a factual causation
 11 link between what's insured and the BI suffered, the
 12 business interruption. Now, that is dangerous. Look at
 13 Fairchild. I've shown you the appellate court's
 14 warnings. The recognised exceptions are limited indeed
 15 and that includes material contribution cases where, for
 16 example, my Lord, there is a scientific limitation in
 17 being able to prove causation: see McGhee and
 18 Bonnington Castings.
 19 Now, the courts have in those cases — and I say
 20 this politely — manipulated the rules of causation for
 21 policy reasons. Those are tort cases. They are cases
 22 of multiple wrongdoers. This is a contract case where
 23 the parties have contracted against the background of
 24 established insurance, legal principles on proximate
 25 cause and "but for". It's a contract case where

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1 soi-disant policy reasons don't come into it, as they
 2 might do in tort, to permit the court to manipulate the
 3 rules. Contractual bargains are not to be rewritten
 4 because of difficult cases. This, my Lords, is not the
 5 case for developing such new previously unrecognised
 6 exception to "but for". There are two reasons
 7 predominantly. There are an awful lot I've got written
 8 down, but I'm going to select two.
 9 Firstly, the FCA has expressly said that it is not
 10 relying on any exceptions to "but for". Two references:
 11 trial Day 1, page 92, lines 2 to 7 {Day1/92:2}; FCA's
 12 written respondent's case, paragraph 8, bundle B,
 13 divider 10, page 336 {B/10/336}. I'm going to least the
 14 last very quickly.
 15 This case is not and never has been about
 16 manipulating the legal rules of causation as occurred in
 17 the extreme circumstances of Fairchild or about making
 18 new law with wide-reaching effects in tort law and
 19 contract law. It's not even about making new insurance
 20 law. That's the first one.
 21 The second reason, my Lord, as I dash, there could
 22 hardly be a more dangerous invitation to the highest
 23 court of the land in an expedited hearing which is
 24 ostensibly about the construction of numerous individual
 25 wordings for my Lords, these judges before me, to go off

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1 and discard the "but for" test in a proximate
 2 cause insurance case. If your Lordships really had
 3 wanted to do that, you should give me about two more
 4 days of legal argument where I take you through all the
 5 legal texts, Professor Stapleton, which your Lordship
 6 I know my Lord Lord Leggatt knows all about because two
 7 of his examples to me were examples from
 8 Professor Stapleton's Law Quarterly Review as I recall,
 9 professor Burrows, et cetera. I have to dash on, my
 10 Lord, I don't have time.

11 But this is not the case, but since Lord Leggatt is
 12 taxing me mercilessly, I'm going to deal with
 13 Lord Leggatt's two categories in relation to wide area
 14 damage. It is what I think he asked Mr Edelman.
 15 I think it was Mr Edelman.

16 The first category that your Lordship put is where
 17 the sheltered hotel — it was a sheltered hotel,
 18 I believe — was closed for two weeks due to damage, but
 19 even if it had been open nobody would have come to the
 20 hotel. So a one soi-disant concurrent cause,
 21 independent. The damage to the hotel, but there was
 22 also damage to the city, are therefore concurrent
 23 independent causes. You know our position: "but for"
 24 means that there is no coverage. I won't repeat the
 25 submissions.

1 Even accepting for the purposes of this bad argument
 2 that I'm wrong about it, your Lordship first category is
 3 limited to true cases of concurrent independent causes,
 4 and that question is entirely fact specific.

5 Secondly, when the case ceases to be one of
 6 concurrent independent causes, in other words damage may
 7 not be fully repaired, but whatever is the state or
 8 condition of the hotel is not such as to cause the
 9 business interruption. At that moment, you come to my
 10 Lord Lord Leggatt's second category, but nobody comes to
 11 the hotel because of the surrounding area damage. In
 12 our case, on any view, that loss is caused by the
 13 uninsured effects of the hurricane and cannot be
 14 recovered.

15 Mr Edelman said, no. He said that even after the
 16 damage ceases to be a cause, you ask "What would have
 17 happened in a normal world with no hurricane anywhere?"
 18 My Lords, we say that that is just a wrong answer and
 19 that is the pervasive element of the entirety of the
 20 FCA's case against my clients on proximate cause and
 21 "but for" cause.

22 Finally, my Lords, because I'm dealing with the
 23 Orient-Express and physical damage. Physical damage is
 24 much more tangible. You can see it, you can feel it,
 25 much more than disease. Applying my Lord Lord Leggatt's

1 categories is not at all easy when you're talking about
 2 disease. Let's say you've got a radial area of
 3 25 square miles. Now, it may be at some stage — it may
 4 be at some stage — that one could describe the
 5 illnesses or the cases of illness within that area as
 6 being of some causative impact, but there will come a
 7 time, my Lord — I've got two minutes left, I'm told,
 8 it's rather like one of these competitions — there will
 9 come a time when that disease or the illnesses in that
 10 area simply will have no causative potency whatsoever.
 11 At that moment, that area ceases to be a concurrent
 12 independent cause.

13 Right. Last points. Last point, my Lord.
 14 Interdependent causes. Those are the only instances
 15 where you see that the "but for" test is properly
 16 applied to concurrent causes. Never anything other than
 17 interdependent: see Lord Hamblen.

18 Finally, my Lords, the Silversea, which is, it seems
 19 to me, my learned friend's best and only case. It is
 20 a case of such irrelevance that not only the court below
 21 but also Mr Justice Hamblen, as then he was, almost so
 22 described it.

23 It was a decision on its own facts based upon
 24 particular expert evidence that was heard. Concurrent
 25 causes were not even argued. It was common ground that

1 the events of 9/11 and the State Department warnings
 2 were concurrent causes. There was no argument on
 3 "but for". There was no argument on interdependent.
 4 There is no legal principle in that case of relevance to
 5 this.

6 I'm afraid I will tell you all about windfall
 7 profits being a terribly point, look at Riley. I will
 8 tell you about more serious the fortuity the less to
 9 recover is an awful point as well. I just don't have
 10 time to cover so many awful points against me. It is a
 11 great shame, but at least I've covered to a degree
 12 "but for" and proximate, which is a bad point.

13 I think I'm out of time.

14 LORD REED: Thank you very much, Mr Kealey. In that event,
 15 we'll turn next to Mr Crane.

16 Submissions in reply by MR CRANE

17 MR CRANE: Can your Lordships see and hear me?

18 LORD REED: Yes, we can, thank you.

19 MR CRANE: Thank you. My Lords, I've got the standard
 20 allocation of 20 minutes in which I have to reply on my
 21 appeal and respond on Mr Edelman's appeal on QBE2 and
 22 QBE3. I'm going to spend the vast bulk of that time
 23 addressing causation on a hypothesis and the hypothesis
 24 is that your Lordships are with me on the construction
 25 of the disease clauses with the result that I'm

1 addressing causation on the hypothesis that the
2 insured peril is not the disease generally, but
3 occurrences or manifestations of the disease within the
4 radius area such as to have caused the
5 business interruption.

6 But before I do that I can't completely ignore the
7 construction issues. On QBE1, I'm going to leave it,
8 apart from making these the points.

9 They all involve hypothetical questions and I'm
10 asking your Lordships to imagine that someone had been
11 asked what this clause meant before the present
12 extraordinary crisis. I suggest that had that question
13 been posed, say, a year ago, the person in question
14 would have replied without too much hesitation that it
15 was intended to provide cover for business interference
16 caused by the manifestation of a notifiable disease
17 within the premises or within 25 miles thereof and that
18 person may have gone on to say that that impression is
19 reinforced by the location of this clause in the
20 contract amongst immediate neighbours providing local
21 cover.

22 Now, assume the same person was asked a second
23 question, which goes like this: How about a disease
24 like SARS, which might spread unpredictably and have
25 widespread effects? To that question he would have

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1 replied "Well, if that's a risk they had in mind, it
2 looks like the radius limitation was intended to ensure
3 that it was only the impact on the business
4 of an outbreak of disease within the specified area
5 which was covered. Otherwise the radius provision
6 wouldn't have made much sense."

7 Now, postulate a third and final question, which
8 goes like this: "Well, it may seem utterly
9 inconceivable, but say the government was to lock down
10 people and businesses nationally without regard to the
11 prevalence of disease in any particular area. Don't you
12 think the cover would be triggered in that event if and
13 when a single case of a disease manifested itself within
14 the insured perimeter?" And he would have replied
15 "What's the sense in that?"

16 If that's the risk the parties had in mind, the
17 radius limit makes no sense. Why should cover in that
18 event depend on the wholly arbitrary contingency of
19 disease entering, perhaps in one case, in the specified
20 area? If that's the risk you wish to guard against, you
21 would need cover against disease generally. My Lords,
22 those are my submissions on QBE1 for what they're worth.

23 QBE2 and 3 I'm going to take an even more radical
24 approach. I haven't addressed the proper construction
25 of those clauses at all orally and I don't have time to

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1 do so. What we do have, however, is a ten-page
2 respondent's case at tab 16 of file B, page 612
3 {B/16/612} which sets out a number of, we would submit,
4 cogent submissions on the proper construction of this
5 clause, the effect of which or the outcome of which is
6 that on any orthodox application of the rules of
7 construction the result hit upon by the court below was
8 inevitable.

9 Now, before leaving construction, can I just take
10 two further points which are relevant to causation and
11 which have gained profile or at least emerged in the
12 course of exchanges between Mr Edelman and the court
13 yesterday.

14 The first is this. It has never been QBE's case
15 that within the specified area their disease clauses
16 cover a single occurrence of disease only if by
17 "occurrence" is meant a single case of
18 notifiable disease.

19 The court below understood this perfectly, that what
20 we were insuring were cases, a case or cases, occurring
21 within the specified perimeter and we can see that at
22 paragraph 235 of the judgment {C/3/104}. I'll be coming
23 back to this in a different context.

24 Three lines down paragraph 235 {C/3/104}, the court
25 said this:

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1 "As we have found that this clause, unlike others we
2 have considered, is drawing a distinction between the
3 consequences of the specific cases occurring within the
4 radius and those not doing so, because the latter would
5 constitute separate 'events', we consider that insureds
6 would only be able to recover if they could show that
7 the case(s) within the radius, as opposed to anywhere
8 else, were the cause of the business interruption."

9 Indeed, if one looks — I won't take you there
10 because it's not an efficient use of time — at
11 declaration 12.1 in relation to QBE2 at {C/1/8}, you
12 will see that the declaration is framed in terms of
13 either a single occurrence or multiple occurrences.

14 Indeed, my Lords, before I leave this point, I would
15 remind the court of the case of
16 Kuwait Airways Corporation v Kuwait Insurance
17 Corporation at first instance, it went to the lords but
18 this point was undisturbed, the judgment of
19 Mr Justice Rix, {E/26/840} at 686 where he discusses the
20 nature of an occurrence in insurance law. An occurrence
21 may denote an event giving rise to a plurality of loss,
22 for example the Iraqi capture of Kuwait Airport on
23 2 August 1990 and the aircraft located there, or the
24 destruction, a famous example in the Dawson's Field
25 arbitration, the destruction of three hijacked aircraft

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1 by the PLO at Dawson's Field in September 1970.
 2 The problem, if it is a problem, of one insured
 3 occurrence cancelling another insured occurrence out,
 4 both occurring within the stipulated area simply doesn't
 5 arise. Any occurrence or aggregate of occurrences is
 6 relevant provided it has a causative impact on the
 7 business, namely it causes business interruption.
 8 LORD LEGGATT: Sorry, Mr Crane, I don't understand why it
 9 doesn't arise if you apply a "but for" test, because if
 10 each is a separate occurrence, as it is, why don't they
 11 cancel each other out if you can say that but for this
 12 particular occurrence the loss would have occurred
 13 anyway because of another occurrence?
 14 MR CRANE: Because they are all part of the insured peril.
 15 LORD LEGGATT: Right.
 16 MR CRANE: You can't set insured perils against each other
 17 if they are the proximate cause of loss.
 18 LORD LEGGATT: Why not if they are different proximate
 19 causes without departing from the "but for" test?
 20 MR CRANE: Because in any causation question you have to ask
 21 whether the insured peril is the proximate cause of loss
 22 and the answer to that as a matter of fact is yes, we
 23 can forget matter of law for the moment, if, in fact,
 24 the insured peril or perils have acted in combination to
 25 cause the loss.

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1 Now, it's highly unlikely that one case of COVID-19
 2 or any other notifiable disease would itself cause
 3 interruption with the business. It's much more likely
 4 that it would be an outbreak in the locality. We accept
 5 that. We've always accepted it.
 6 My Lord, it's never been part of our case that in
 7 a case where there is a cluster of disease within the
 8 relevant specified area you take each occurrence
 9 separately and examine its causative effect.
 10 LORD LEGGATT: I realise it's not part of your case, I was
 11 trying to test how you distinguish what isn't your case
 12 from what is your case which is where there was
 13 occurrence outside the area and why that makes
 14 a critical difference to the principle of causation.
 15 MR CRANE: Well, it makes a difference for this very
 16 straightforward reason, my Lord. Once you have
 17 an occurrence of disease outside the stipulated area,
 18 it's not an insured peril. That's why -- I'm jumping
 19 ahead -- that's why, when we come to consider causation
 20 on a certain hypothesis as to the properly identified
 21 insured peril, we're comparing the aggregate of cases of
 22 disease insured within the area, we're comparing their
 23 impact with the aggregate of cases of disease everywhere
 24 else in the UK. I will justify that in due course, if
 25 I may.

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1 Before leaving this I should also correct
 2 a submission made by Mr Edelman which, with respect,
 3 Lord Leggatt corrected to an extent. It's never been
 4 our case that where the outbreak strays across the
 5 boundaries of the insured perimeter cover ceases. Nor
 6 has it been our case that it's only in cases where there
 7 is a de minimis occurrence outside the insured perimeter
 8 that cover exists.
 9 In a case where an outbreak straddles the insured
 10 area and a non-insured territory, if I can describe it
 11 thus, you have to make a judgment of fact. You have to
 12 ask whether the cases occurring within the insured
 13 radius are the proximate cause of the interference with
 14 the business. This may involve more or less difficult
 15 judgments. Sometimes it's quite easy. The fact that
 16 there are just a few cases outside the perimeter, you
 17 can infer that any measures taken in response to the
 18 outbreak were prompted by cases within the insured area.
 19 Conversely, if there's one case within the insured area
 20 and a multiplicity of cases outside, the reverse
 21 assumption or the reverse conclusion will be the case.
 22 I would like to leave it at that, so long as there
 23 is no ambiguity as to our case.
 24 My Lords, can I now turn to causation on the premise
 25 that these QBE clauses properly construed respond to the

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1 insured peril of disease occurring or manifesting itself
 2 within the insured perimeter, if that is causative.
 3 Against that background I completely adopt
 4 Mr Kealey's submissions on "but for" cause and the
 5 dangers inherent in disregarding it. But I also
 6 maintain that we need no help from "but for" causation
 7 to make out our case on causation on the hypothesis to
 8 which I have referred. The starting point is
 9 paragraph 347 of the FCA's respondent's case, and
 10 I wonder whether we can just look at that very briefly.
 11 It's in {B/10/439}. It's a short paragraph but it's
 12 very important. It's dealing with concurrent
 13 interdependent causes and it says:
 14 "In any event, there are concurrent proximate causes
 15 only where the concurrent causes are of equal or nearly
 16 equal efficiency in bringing about the damage."
 17 The references bear out that proposition. They're
 18 to Wayne Tank, The Miss Jay Jay and a case called
 19 Svenska Handelsbanken v Dandridge, which I respectfully
 20 commend to your Lordships, especially the passage on
 21 causation at 1685 {G/86/1685}. I haven't got time to go
 22 there, but I would respectfully invite your Lordships to
 23 read that statement of orthodox principles of causation
 24 by the Court of Appeal.
 25 Now, those are concurrent causes, interdependent

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1 causes, where neither A nor B on its own could have
2 caused the loss. But as I understand Mr Edelman's case,
3 what he wants do is migrate from interdependent causes
4 to what he calls independent but interlinked causes and
5 leave behind the constraints which he concedes are
6 applicable in the paragraph to which we've just
7 referred, namely that where the insured peril and the
8 non-insured peril are concurrent causes, the insured
9 peril must be at least of equal efficiency with
10 non-insured peril. In fact, if one looks at that
11 paragraph, the conventional position is that once you
12 leave interdependent causation, you have to establish
13 that the insured peril is the proximate or dominant
14 cause.

15 But let's relax for a moment the requirement of
16 dominance and say it must at least have equal
17 efficiency. This is important because if you're going
18 to leave behind "but for" causation, you've got to fill
19 the void with something.

20 Our submission is that when you are looking at
21 independent causes, perhaps interlinked, you have to
22 identify that peril, the insured peril, which is the
23 proximate cause of loss or at the very least of equal
24 efficiency that accords with non-insured perils. That's
25 exactly what the court below did in an exercise which in

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1 our submission was impeccable. It applied orthodox
2 principles of proximate cause. We can see that, my
3 Lords, quickly. Go to paragraph 110 of the judgment
4 {C/3/69} at page 69 of C3.

5 C, tab 3, sorry. That's become familiar to the
6 court. There the court below identify the
7 insured peril, we say incorrectly as the disease at
8 large and measures taken in response. But the important
9 point for my purposes addressing causation at this
10 moment is to recognise that the court's articulation of
11 the alternative principle of causation in paragraph 112
12 proceeds on the basis that that is the insured peril.

13 Now, having reached the conclusion that the
14 insured peril is the disease in the UK at large, but
15 there's no perhaps particular reason to ask whether any
16 particular case of the disease has a causative status
17 more or less than any other case because the measures
18 taken in response to the disease nationally on any view
19 were causative.

20 But when the court in fact moves to consideration of
21 causation having properly or correctly identified the
22 causative peril, we see a completely different approach
23 to causation and we see that in paragraph 235 {C/3/104}.
24 This is the court's conclusion on QBE2, and I've read to
25 the court the first sentence or so in a different

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1 context, but it's the last sentence which matters:

2 "In the context of this clause, [given the
3 insured peril] it does not appear to us that the
4 causation requirement could be satisfied on the basis
5 that the cases within the area were to be regarded as
6 part of the same cause as that causing the measures
7 elsewhere."

8 "That's the indivisible cause of the disease at
9 large. Or [and this is the alternative view of
10 causation] as one of many independent causes each of
11 which was an effective cause, because this clause, in
12 our view, limits cover only to the consequences of
13 specific events."

14 So what the court is saying there is once we
15 conclude that the insured peril is the aggregate impact
16 of cases within the specified perimeter, you then have
17 to ask whether those cases caused the
18 business interruption and you compare their causative
19 impact, which in fact is nil, with the causative impact
20 of the disease elsewhere in the UK generally and
21 measures taken in response.

22 Now, Mr Edelman says that in coming to that
23 conclusion they simply forgot about their alternative
24 view of causation. That's palpably incorrect or
25 evidently in causation, so in the sentence which I just

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1 read. What the court concluded is that that view of
2 causation was inapposite once they departed from
3 treating the insured peril as the disease throughout the
4 UK generally.

5 Now, that orthodox approach to causation which
6 merely asked "What is the proximate cause of the loss,
7 is it an insured peril?" Is repeated at different
8 paragraphs of the judgment. We've been to some of them.
9 418, my Lords, at page 149 {C/3/149}, where the court
10 approaches causation in the context of a clause which
11 responds to dangers and disturbance and incidents within
12 the vicinity of the premises. You can see the relevant
13 wording at 391 {C/3/143}:

14 "An incident occurring during the period of
15 insurance within a one mile radius of the insured
16 premises which results in a denial of access."

17 There it's a local focus, so what you're asking is
18 whether the interruption of the business could be said
19 to have been caused by that insured peril. We have the
20 same sort of orthodox focus and answer at 437 {C/3/155}.
21 I won't read all of these because they're to similar
22 effect. 436, I should say, and 437. Paragraph 444,
23 {C/3/157} paragraph 467, {C/3/158} and paragraph 502
24 {C/3/160}.

25 My Lords, I hope this doesn't seem too formalistic

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1 a point, but if one reads the FCA's notice of appeal
 2 ground 4 against the court's findings on QBE2 and 3,
 3 I will leave the court to read it at leisure, it's at
 4 file {A/1/125}, paragraphs 59 to 62, there's an appeal
 5 against the conclusion on construction but no separate
 6 or even linked appeal on the question of causation.
 7 Now, that means that actually we were rather taken
 8 by surprise when we saw this point advanced in the
 9 respondent's case on the hypothesis that they lost on
 10 construction. You're familiar with the alternative view
 11 of causation because that was the first time we'd seen
 12 it articulated, but even if they went down on
 13 construction somehow or other that would get them home.
 14 I'm not taking a technical point, I'm just saying that
 15 it looks a bit of an afterthought and I can see why.
 16 Yes, Lord Leggatt.
 17 LORD LEGGATT: You have had time to think about it by now,
 18 Mr Crane, but anyway. On the construction point,
 19 I thought that one of the arguments that insurers
 20 make — I don't know whether you make it, but others do
 21 at least — is that it's wrong to construe the 25-mile
 22 limit in the way that the Divisional Court did because
 23 it's not the disease that is being insured which might
 24 just manifest itself partly within the limit, it is
 25 occurrences of the disease and an occurrence means

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1 somebody, an individual, suffering from the disease and
 2 we had, you know, my disease isn't your disease and that
 3 sort of stuff. Now —
 4 MR CRANE: (Inaudible).
 5 LORD LEGGATT: — you're then trying to reverse that on
 6 causation and now aggregate the occurrences as though
 7 they're a single cause when in fact the correct analysis
 8 is surely that which the Divisional Court in its
 9 alternative paragraph, I think it's 112, which is that
 10 each occurrence is a separate insured peril or
 11 uninsured peril if it's outside the area.
 12 MR CRANE: My Lord, as Mr Edelman pointed out repeatedly in
 13 addressing the court yesterday, QBE have constantly
 14 referred, or not constantly but frequently, to
 15 an outbreak. We've never been scared by that term and
 16 indeed he invoked it in support of some other part of
 17 his argument.
 18 Whether —
 19 LORD LEGGATT: I agree, he tries to have it both ways the
 20 other way around from you on the two points.
 21 MR CRANE: But, my Lord —
 22 LORD LEGGATT: The outbreak is your primary argument but the
 23 individual case is that he's wrong about that.
 24 MR CRANE: Yes. I've never tried to have it the other way.
 25 LORD LEGGATT: All right. Well, I will put the point to

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1 Mr Salzedo then.
 2 MR CRANE: I'm sorry, my Lord, I didn't mean to talk over
 3 you.
 4 Whether it's disease manifested or disease
 5 occurring, notifiable disease occurring, in QBE2 in the
 6 premises or within 25 miles thereof depending on the
 7 facts, it may be a single episode or it may be numerous
 8 such episodes. It's more likely to be the plural than
 9 the singular and in cases where there is a cluster of
 10 occurrences all insured, then that's the peril which you
 11 have to address for the purposes of causation.
 12 LORD LEGGATT: Thank you.
 13 MR CRANE: One minute. My Lord, in support of the approach
 14 of the court below I make the following submissions.
 15 Every policy has to be considered as a stand-alone
 16 contract. The question to be asked in relation to each
 17 policy is: were the insured cases a proximate cause of
 18 the loss to the business, eg the losses caused by and
 19 following the government advice of 16 March and the
 20 regulations of the 21st and 26th? This is not a case of
 21 multiple wrongdoers or even multiple insurers each has
 22 to be considered on a stand-alone basis.
 23 Second, do not be beguiled by a map of England
 24 covered by 20 contiguous circles. We have to consider
 25 each case of causation as a stand-alone proposition,

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1 tested in the case of a policy with a one-mile radius in
 2 a remote part of the UK where the recorded cases of
 3 COVID occurred relatively late in the day, perhaps even
 4 after the business had been closed as a result of the 21
 5 and 26 March Regulations.
 6 By what contortion of reasoning, we ask, can it be
 7 said that the local case or cases within the radius were
 8 a proximate cause of the business interruption? How can
 9 it be said that the local cases have an equal causative
 10 impact when compared with the aggregate impact of all
 11 other cases in the UK? It's important to understand how
 12 the proviso works when the first case in the relevant
 13 area follows the commencement of the
 14 business interruption.
 15 I think this got lost in an exchange on the Scilly
 16 Isles yesterday. In such a case Mr Edelman suggests
 17 that the single case within the relevant area is then
 18 a contributing cause to continuing
 19 business interruption, notwithstanding that that's
 20 a grotesque act of fiction in circumstances where the
 21 business has been closed, say, a week or two weeks
 22 earlier. That's how it works.
 23 My Lords, I've used my time and thank you for
 24 hearing me out.
 25 LORD REED: Thank you, Mr Crane. We turn now to Mr Turner,

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1 I believe.
 2 Submissions in reply by MR TURNER
 3 MR TURNER: My Lord, I'm going to leave Mr Salzedo to come
 4 back to Lord Leggatt on his perils point, if I may. Can
 5 I just start with a preliminary point, which is on
 6 a couple of occasions during the course of his
 7 submissions Mr Edelman treated you to his surmise as to
 8 why things had been argued in a particular way at
 9 a particular time by RSA. I don't know whether
 10 your Lordships relied upon Lord Wilson for your racing
 11 tips, but if you do or did please continue to do so
 12 because Mr Edelman's powers of surmise are consistently
 13 wrong.

14 Can I say a little bit more please in relation to
 15 proximate cause and pick up Mr Edelman's example or
 16 illustration of the pins on the map and for your
 17 reference that was Day 3, page 51, line 7 and following
 18 {D3/51/7}.

19 The number of pins in Mr Edelman's map may not yet
 20 be infinite and may not have been infinite at the point
 21 at which the regulations came into effect on 20 or
 22 26 March as the case may be, but you will recall being
 23 told by Mr Edelman that if one applied the infection
 24 rate estimated in the Imperial College report, there
 25 would have been about 1.8 million cases spread

1 throughout the UK by 28 March 2020.
 2 Now, one can put that in the context perhaps of the
 3 origins of the proximate cause rule because Mr Edelman
 4 says each of those pins is a proximate cause of each
 5 insured's loss and of the government actions. If one
 6 goes back to the origins of the proximate cause rule,
 7 those can be traced back at least in terms of the
 8 encapsulation of the rule to the late 16th century and
 9 Bacon's Maxims of the Law.
 10 We've inserted those into your Lordship's bundle,
 11 new bundle L, tab 1, page 3 {L/1/3} is the relevant
 12 maxim. The explanatory text perhaps illuminates the
 13 point which was raised by Lord Hodge on Day 3, my Lord
 14 Lord Hodge at Day 3, page 67, lines 3 to 9 {D/67/3-9}
 15 where Lord Hodge posed the question that proximate cause
 16 perhaps involved a further requirement at the point of
 17 enacting the Marine Insurance Act as opposed to
 18 something different from "but for" causation.

19 Now, as confirmed in Leyland Shipping, amongst other
 20 authorities, the 19th-century translation that we see in
 21 bundle L, at page 3 {L/1/3}, of "proxima" as "immediate"
 22 has been refined to "dominant", in the words of
 23 Viscount Haldane in Leyland Shipping, or, to borrow from
 24 Lord Shaw's speech, "effective", {E/27/896} or
 25 "efficient" {E/27/895} as causes of the loss.

1 It is in that context that the parties have so far
 2 been unable to identify any case with more than two
 3 proximate causes in the field of insurance as known to
 4 the courts of England or Scotland. That isn't
 5 an accident. In our submission, one simply cannot
 6 describe one of a series of a million or more events
 7 each adding an infinitesimal amount, perhaps a 10,000th
 8 of 1% or so, as being an efficient, effective or
 9 dominant cause of a loss.

10 If we take Mr Gaisman's nail bar and position it in,
 11 say, Huddersfield, and borrow from Leyland Shipping by
 12 way of analogy, that nail bar was not torpedoed by the
 13 fact that a Mr Jones in a village outside Bodmin caught
 14 COVID — and on the FCA's case possibly did so
 15 asymptotically — without ever having been diagnosed
 16 as having COVID.

17 The nail bar was torpedoed, as the FCA accepts in
 18 its particulars of claim, by the national pandemic and
 19 by the measures taken to contain it. We submit it would
 20 simply be an abuse of language to describe Mr Jones'
 21 occult infection being perhaps 1 millionth of the whole
 22 as at the relevant date and the corresponding pin as
 23 being an effective, efficient or dominant cause of the
 24 nail bar's misfortune.

25 Again, to borrow from Lord Shaw in Leyland Shipping

1 at page {E/27/896}, Mr Jones' infection cannot be, and
 2 I quote:

3 "... variously ascribed the qualities of reality,
 4 predominance [or] efficiency".

5 Now, the itemisation of cause which is illustrated
 6 so graphically by Mr Edelman's pins is, in our
 7 submission, wholly antithetical to the notion of
 8 proximate cause.

9 My Lord, my next points relates to the RSA1
 10 counterfactual where Mr Edelman made a number of
 11 forensic submissions, including as to RSA's pleading,
 12 where he referred you to a part of the pleading which
 13 was dealing with general principles in relation to
 14 causation and not in a part of the pleading that was
 15 dealing specifically with RSA1. I've already accepted
 16 that it took us longer to get to the light bulb moment
 17 than Mr Gaisman. The forensic approach taken by
 18 Mr Edelman should not obscure, in my submission, the
 19 need for the court to consider how as a matter of
 20 principle a hybrid clause such as the one in RSA1 is
 21 intended to operate. And in respect of that, I adopt
 22 Mr Gaisman's submissions before lunch specifically in
 23 relation to the second question that he posed in
 24 relation to the 13th chime.

25 Very briefly on the RSA3 disease exclusion, my

1 Lords, it was suggested by Mr Edelman that the exclusion
 2 did not apply to the product liability subsection. That
 3 was a submission made by reference to the contents page.
 4 It was another sophisticated argument advanced on the
 5 strength of failing to show you the wording of the
 6 section itself. Section 6 starts at page 1255 in
 7 bundle C {C/16/1255} and it starts under the heading
 8 "Section 6 – Public liability", it has subsection (a)
 9 "Public Liability" and then five pages later or four
 10 pages later on, 1261 {C/16/1261} subsection (b) "Product
 11 Liability". Everything in section 6 is excluded or is
 12 excepted from the exclusion.
 13 My Lord, in relation to closure or restrictions and
 14 enforced closure, you have our respondent's case at
 15 {B/17/622} and in relation to the example of the insured
 16 who decides one morning when he wakes up that he can't
 17 be bothered to open the premises, so there's
 18 a voluntarily closure, and the word "enforced" being
 19 there to emphasise that particular point, well
 20 a voluntary closure wouldn't be covered in any event
 21 because it's not a fortuity. Mr Edelman's attempt to
 22 invest the word "enforced" with some special meaning was
 23 actually an attempt to deprive that word of any content.
 24 It is there for a reason. It means what it says.
 25 My Lords, I am out of time and Mr Salzedo awaits.

1 LORD REED: Thank you very much, Mr Turner. Well,
 2 Mr Salzedo, I think there are ten minutes left to you,
 3 so your ten minutes begin now.
 4 Submissions in reply by MR SALZEDO
 5 MR SALZEDO: Thank you, my Lords.
 6 Mr Edelman confirmed on Day 3, page 7 {Day3/7:1}
 7 that he did accept that as a result of the words of
 8 proximate causation and he immediately followed that
 9 with a statement that underlying all his submissions is
 10 actually it doesn't matter because of our concurrent
 11 cause argument. That response reflects the reality that
 12 the argument in this court has demonstrated that the
 13 primary basis upon which the court below found against
 14 Argenta is unsustainable. Grounds 1 to 4 of Argenta's
 15 appeal should succeed and that leaves my remaining nine
 16 and three-quarters minutes, ground 5, the concurrent
 17 cause argument.
 18 My Lord, in an almost literal footnote to
 19 Mr Kealey's submission, another authority for
 20 Mr Kealey's correct answer to my Lord Lord Leggatt's
 21 question about fire and lightning is
 22 Jobling v Associated Dairies, which is in the bundle at
 23 {G/62/1079}. I obviously don't have time to go there.
 24 If your Lordship think that Jobling is a notoriously
 25 difficult case for me to cite, then that only confirms

1 Mr Kealey's submission that this appeal about the
 2 construction of contracts is not the one in which to be
 3 reviewing it.
 4 My Lords, another question that's arisen in this
 5 regard and in relation to which I apprehend that my Lord
 6 Lord Leggatt has a question for me already --
 7 LORD LEGGATT: Jobling is an example of a case with
 8 a supervening cause, isn't it, if I remember, as opposed
 9 to one like the fire case where the two fires burn down
 10 the house at the same time?
 11 MR SALZEDO: My Lord --
 12 LORD LEGGATT: (Inaudible due to overspeaking) problems.
 13 MR SALZEDO: Well, I see the argument, my Lord, but I hope
 14 your Lordships can see that there is also a pretty
 15 strong argument that actually they raise the same
 16 essential problem. But it shows that the issue is
 17 very context-dependent and that the context of
 18 an insurance policy is one in which the crucial question
 19 is the construction of the insured peril and the crucial
 20 question is not an abstract question of cause for
 21 a philosopher and it's not necessarily the same question
 22 as a question of whether a wrongdoer has caused whatever
 23 the consequences are that that are prohibited by the
 24 rule in question.
 25 My Lord, I fear I may incur a still further question

1 by coming onto the question what is meant by the words
 2 "any occurrence". Now, I adopt what Mr Crane has said
 3 about this, but there are some Argenta-specific points
 4 to add.
 5 In opening, my Lords, I pointed out that the meaning
 6 of any occurrence in Argenta1 was common ground.
 7 I showed your Lordships the record of this in a judgment
 8 at paragraph 158 at {C/3/84} and what I showed
 9 your Lordships there was that it was common ground that
 10 an occurrence was constituted by at least one case, not
 11 that each case was itself an occurrence. That, in fact,
 12 reflected common ground on the pleadings between the FCA
 13 and Argenta, the relevant parts of which are not before
 14 this court, because the common ground has not been
 15 challenged on this appeal.
 16 As the FCA pointed out in its written case at
 17 paragraph 166 {B/10/383}, this common ground is the
 18 reason why Argenta has always in this case conceded
 19 expressly that a local lockdown like the one in
 20 Leicester might well be proximately caused by
 21 an occurrence within 25 miles of some policyholders.
 22 The Argenta cover does cover interruption caused by
 23 local cases, including multiple cases in the same areas,
 24 which is reflected in the use of the term "any
 25 occurrence" and not the words "a case". But that does

1 not transform it and this, I think, is the question that
 2 my Lord was waiting to put to me, that does not
 3 transform it into cover for all the consequences of
 4 a global or national pandemic, because if it were there
 5 would have been no radius limit.
 6 Now, in my opening submissions I was making the
 7 point that the mere fact that multiple cases are part of
 8 one occurrence does not mean that all cases in the
 9 outbreak including beyond the radius are covered. When
 10 I was asked by my Lord Lord Leggatt about this very
 11 issue on Day 1, page 73 {D1/73} and I made it clear that
 12 Argenta still accepted that common ground as a matter of
 13 substance.

14 Now, my Lords, if the transcript is accurate, in the
 15 heat of the moment in my answer I confused cases,
 16 occurrences and indeed outbreaks willy-nilly. My Lord,
 17 I resile from that confusion but I do not resile from
 18 the substance of the answer which is that multiple cases
 19 are covered and they are, in fact, as a matter of common
 20 ground, covered by the phrase "any occurrence".

21 Even yesterday, my Lord, at Day 3, pages 60 to 62
 22 {D3/60-62} Mr Edelman insisted on the argument that I've
 23 referred to as having been made at paragraph 166 of his
 24 respondent's case, the matter has always been and still
 25 remains common ground.

1 Now, my Lords, the common ground is also the natural
 2 reading of the whole phrase in its context. If I can
 3 take you back to {C/5/317}, you will see or be reminded
 4 that three of the paragraphs of box 4 use the phrase
 5 "any occurrence". In each of those sub-paragraphs, if
 6 the word "occurrence" limited the matter to a single
 7 case, they would all be open to the concern that's been
 8 raised a few times by my Lord Lord Leggatt that
 9 individual cases within the radius could causally defeat
 10 each other, and there are two answers to that question.

11 The first answer is to accept the common ground
 12 about the meaning of "any occurrence" which has been
 13 acceptable all parties and the court below and at the
 14 very least is at least an available and natural reading
 15 of the words.

16 The alternative answer, my Lords, to go slightly
 17 broader into how this works in insurance policies, is to
 18 hold that as a matter of the construction of any
 19 ordinary insurance policy if it insures against two or
 20 more perils and multiple insured perils come together to
 21 cause loss, even if you need more than one peril to make
 22 a sufficient cause of the loss that's eventuated, that
 23 is an insured loss. Because otherwise, in any
 24 multi-peril policy, take for example an all-risks
 25 policy, there will be many factual examples where the

1 self-cancelling argument that my Lord has made to a few
 2 counsel in this hearing will be open to insurers.

3 Now, that can't be right and the court is then faced
 4 with the question, well, is it not right, because as
 5 a matter of construction if you insure more than one
 6 peril and more than one peril happens and causes loss,
 7 that is part of what you've insured, or is it not right
 8 because we need to throw overboard the general law of
 9 "but for" causation which has stood the law in such good
 10 stead and provided such certainty for English commercial
 11 law over centuries? In my submission, once one poses
 12 the question in that, it is completely obvious what the
 13 answer is: Insured perils are insured, even if you need
 14 more of one of them to make a loss, but there is no
 15 reason to look outside what's insured and add that to
 16 the insurance. There's no reason to do that at all.

17 My Lords, the correct starting point is the words of
 18 the contract. The underlying fallacy in Mr Edelman's
 19 submissions is to suggest that there was some
 20 unqualified disease risk which was insured and this is
 21 the point about outbreak where my Lord says I'm trying
 22 to have it both ways by saying we didn't insure
 23 an outbreak.

24 My Lord, we insured multiple cases within the
 25 perimeter. We did not insure any outbreak of which

1 those multiple cases happened to be part. You can call
 2 what happened within the perimeter an outbreak, but that
 3 does not make it the wider outbreak. It may even be
 4 part of a wider outbreak, but it doesn't mean that what
 5 was insured was the wider outbreak.

6 The starting point is the words of the contract and
 7 the enquiry that the court makes in relation to the
 8 words of the contract is as to what was insured by those
 9 words, not into what remained uninsured. What remained
 10 uninsured is simply whatever is left. What that enquiry
 11 reveals, when one looks at the words of Argenta1 or the
 12 other simple disease clauses, is that there was
 13 a comprehensible and meaningful agreement by the parties
 14 to insure the consequences of disease within a 25-mile
 15 radius which, as one sees from what's happened with
 16 COVID, is entirely meaningful. It will include local
 17 lockdowns, of which there have now been many more since
 18 Leicester where appropriate, but that does not mean that
 19 you have to bludgeon the words or even worse bludgeon
 20 the law of causation into some preconception that the
 21 cases within the perimeter are necessarily part of some
 22 wider matter, if that matter was uninsured.

23 Your Lordships should resist the invitation and
 24 temptation to do any bludgeoning. Your Lordships should
 25 interpret this contract as any reasonable reader would

1 have done when it was made and allow Argenta's appeal in
2 full .

3 LORD REED: Thank you, Mr Salzedo. So now we turn to
4 Mr Edelman for the FCA's reply.

5 Submissions in reply by MR EDELMAN

6 MR EDELMAN: My Lord, yes, and can I start with causation
7 and I think I have a full right of reply to Mr Crane in
8 relation to QBE2-3 and a right to deal with any new
9 points of law that might have been raised during the
10 course of other submissions, any new points that arise
11 but not of course otherwise a general right of reply and
12 of course a right of reply on my appeal.

13 Can I start with one observation, though. Mr Kealey
14 particularly complained about a lack of time and
15 introduced a lot of new material in his reply.

16 Firstly , we have, of course, had eight days of trial
17 at first instance with insurers producing 860 pages of
18 written submissions. They've done another 230-odd pages
19 of submissions for this appeal. They've had two days.
20 They've had the opportunity to divide time between them
21 as they saw fit. They've chosen to divide it equally
22 and repeat each other on a number of occasions. That's
23 their lookout. They've had adequate opportunity to make
24 these points and if Mr Kealey ran out of time, that's
25 the problem as between the insurers.

1 But turning specifically to the causation arguments
2 that Mr Crane was making, my Lords can now see, once you
3 actually start analysing what insurers are saying about
4 their case, how it all starts to unravel. Because first
5 they say "Look, it's individual cases of the disease.
6 That's what it says", and my Lord Lord Leggatt put to me
7 it says "an illness sustained by and that's by
8 an individual". But then, of course, they're driven to
9 accept and did accept -- and Mr Crane accepts and I'm
10 focusing on him because I've got a full right of reply
11 against him for QBE2 and 3 -- he accepts that, "Well,
12 when it says illness sustained, it doesn't actually
13 mean, it cannot be intended to mean an individual case,
14 it must mean lots of cases or at least encompass lots
15 cases". That makes sense when you've got a radius of
16 2,000 square miles. It would also make sense when
17 you've got a radius of 3.14 square miles of the one-mile
18 cases.

19 So although they're a bit nervous about it, what
20 they really do now come to accept is that "occurrence"
21 does in practical terms mean an outbreak. An outbreak
22 of the disease within the relevant policy area.
23 Mr Crane accepted it, I haven't got a right of reply to
24 him but I will note perhaps that Mr Salzedo has just
25 accepted it and he's got the same wording "illness

1 sustained any person". So it's the nature of the risk
2 which is driving them to this concession.

3 Once they make that concession, you then have
4 an outbreak in the relevant policy area which is in fact
5 an indivisible part. You have an indivisible outbreak
6 in the country of which the outbreak in the -- there
7 isn't really a separate outbreak in the relevant policy
8 area, it just happens to be part of the national
9 outbreak.

10 That's where you then get to the court's conclusion
11 on construction. Well, if this is contemplating
12 outbreaks, not odd cases but is contemplating at least
13 including outbreaks and they're accepting that
14 conclusion because that's what happens within the
15 relevant policy area, they know it's not going to be one
16 case it's going to be a whole cluster of cases in the
17 area, then you're driven to the conclusion everybody
18 must have contemplated when you're dealing with this
19 sort of risk that if there was an outbreak like that
20 there was every chance that it was going to be outside
21 as well as within. And you do then ask the question,
22 and this is what the court posed: was it really intended
23 that you should then get this arbitrary response of the
24 policy depending on the precise shape of the outbreak
25 and whether it does or doesn't straddle the boundaries?

1 Is that really what the parties intended when they are
2 insuring this type of risk?

3 So one sees it in a nutshell with what Mr Crane and
4 Mr Salzedo were actually driven to accept to get away
5 from the obvious artificiality of an individual case.

6 Our alternative concurrent cause case is simply,
7 well, if you want to go down the artificial route of
8 treating these all as individual cases, that is where
9 you got to. But actually if it's all an indivisible
10 outbreak and it just happens to be present in the
11 relevant policy area, that's what the policies
12 contemplated and for that you don't need any rules of
13 causation at all. It's quite simple.

14 I can illustrate this -- and this is not replying to
15 Mr Kealey, it's just illustrating the point that I was
16 making -- with two fires, one of which is caused by
17 an insured peril and one of which by an uninsured peril
18 which merge and cause the damage. Now, the critical
19 point about insurance is it's all about the transfer of
20 risk. It sounds facile to say that but it is important
21 to distinguish the nature of the contract as being the
22 transfer of risk and it's the transfer of risk of the
23 insured peril from the policyholder to the insurer. The
24 insurer accepts that risk for a price; the premium.
25 This is not about remedies against a wrongdoer who

1 causes injury, it's about transfer of risk.
 2 With all respect to the submissions that Mr Crane
 3 has made, if you have a situation in which a loss is
 4 caused by the overall effect of something which is
 5 partly caused by an insured peril or concurrently caused
 6 by an insured peril and an uninsured peril, then that is
 7 covered by the policy unless the non-covered element is
 8 excluded.

9 So in the fire example where you have two fires
 10 which merge, the simple answer would be that if the
 11 other fire was -- and it's caused by an excluded peril
 12 there is no cover, if it's caused by an uninsured but
 13 not excluded peril, it is covered. And that's why
 14 insurance is different because it's a transfer of risk.
 15 If the risk has manifested itself in that way, you have
 16 insurance cover.

17 So that, we say, is a quite simple analysis and here
 18 what you have is the outbreaks in each area forming part
 19 of one indivisible national epidemic and it's like the
 20 fires merging. Fire is raging in each policy area, but
 21 in fact it's a national fire. It's all one big fire.
 22 Fires may not be the great analogy because disease is
 23 a different thing. But if one is trying to draw some
 24 analogy, that's it. The fact that you can see the fire
 25 in different parts of the country doesn't mean that that

1 fire is ceasing to be causative of the damage that the
 2 whole fire, the merged fire, is causing.

3 So that's what I wanted to say in response to
 4 Mr Crane on the general point.

5 One other point on the construction of his policies,
 6 where he goes wrong, in our submission, is to read
 7 paragraphs of the judgment in isolation. One has to
 8 look closely at paragraph 102, page 67 {C/3/57}, this is
 9 his answer to my causation point and his reliance on
 10 what was said in paragraph 235 {C/3/104}. If one goes
 11 to 102, when discussing the RSA policy you'll see that
 12 the way it approaches construction is it asks five lines
 13 down or so {C/3/67}:

14 "Extension vii (a) is not expressly confined to
 15 cases where the interruption has resulted only from the
 16 instance(s) of a Notifiable Disease within the
 17 25 mile ... As opposed to instances elsewhere. Nor in
 18 our view does the language used in this clause
 19 implicitly have that effect."

20 If you read the judgment as a whole in context and
 21 then you go to paragraph 235, which Mr Crane relied on,
 22 in our submission, if you read it as a whole, it is
 23 apparent that what the court is doing -- and if you read
 24 everything as whole -- what they are doing is they are
 25 treating QBE2 and 3 as being an exception as if it said

1 "resulted only from the instance of disease" and it's
 2 only in that way that you can make sense of their
 3 conclusions about causation and their answer here.

4 What we say is that that was an extra stage in the
 5 reasoning that they missed out. They might have said,
 6 "Well, this doesn't fit with the other construction" but
 7 they then needed to consider the next question, if it
 8 requires looking at cases locally and isn't considering
 9 this broader outbreak potential, then is it nonetheless
 10 something which has to be only within the policy area?

11 They seem to have just jumped to that conclusion and
 12 that is the way we submit one rationalises their
 13 judgment but it's wrong, because there is nothing in
 14 QBE2 or 3 to suggest that the word "only" should be
 15 written in. Once you recognise that as being the
 16 court's error, then you realise that they missed out our
 17 concurrent cause argument if you get to that stage of
 18 the analysis.

19 I can't see if there's anything -- I think that's
 20 all I needed to say in relation to Mr Crane's arguments
 21 on causation. On Mr Kealey's argument, there was just
 22 one point that I wanted to make because he dealt with
 23 Zurich v IEGL and I think I'm entitled to respond on
 24 that.

25 In that case, the situation was -- I think I've

1 dealt with this in my submissions, but just in case
 2 I didn't. First, the argument on defence costs was that
 3 Zurich was only on risk for six of the 27 years for
 4 which there was a claim and so on defence costs it could
 5 be said that but for the insured being sued for Zurich's
 6 years of exposure, the defence costs would still have
 7 been incurred because of all the other years of
 8 exposure, and so the defence costs weren't but for
 9 caused by the insured occurrences.

10 But it was not a submission that found favour and it
 11 was being suggested they didn't even find that the
 12 defence costs should be apportioned by reference to
 13 those years. Zurich were liable for all of the costs
 14 even though they weren't a "but for" cause of the
 15 allegation -- the insured claims weren't a "but for"
 16 cause of the loss being incurred.

17 Then there's only one point on Mr Gaisman where
 18 I think I've got a right to say something and that is
 19 paragraphs 278 of the judgment {C/3/114} which he said
 20 wasn't challenged. That is at page 114 in bundle C. He
 21 says the court was adopting "but for" but we submit on
 22 the plain reading of that paragraph of the judgment
 23 they're saying whatever basis on which you're looking at
 24 a counterfactual it doesn't matter because this is the
 25 answer. Mr Gaisman, we submit, is clutching at straws

1 to say that that is a finding in his favour that there
 2 is a counterfactual "but for" at the primary causation
 3 stage. They just say whatever stage one might be
 4 applying the counterfactual, the answer is the same.
 5 Now, I come to the specific submissions that were
 6 made and there's one which, while I'm on Mr Gaisman's,
 7 I will make because it's relevant to my — it's a point
 8 on an appeal. It's actually on solely and directly
 9 which he did not address orally and he's now introduced
 10 in his reply submissions, so that is another new point
 11 which I think I'm entitled to reply to. So that's on
 12 his wording and if we take Hiscox 4, it only really
 13 matters to Hiscox 4 because only that has a radius
 14 requirement, and I will just find it. The introduction
 15 is at page 498 the preamble {C/9/498} of bundle C. The
 16 answer is quite a simple one, which is perhaps why
 17 Mr Gaisman thought better of wasting time on it in
 18 opening but only in desperation went to it in reply. It
 19 says indemnifies against financial losses:
 20 "... resulting solely and directly from
 21 an interruption to your business caused by ..."
 22 The simple answer is that the "solely and directly"
 23 words only apply between loss and interruption. I don't
 24 disagree with him about the cause of those words, but
 25 what they mean is you can only get losses which are

1 solely caused by an interruption to your business. But
 2 then what causes the interruption is the subject to
 3 a different causation regime and it's own causation
 4 regime, and so the words just simply don't apply at the
 5 stage of the analysis with which we are involved.
 6 I think with those comments I can go back to the
 7 issues on my appeal and start with Mr Lockey. I may
 8 come back to Mr Gaisman in turn in due course on the
 9 FCA's appeal.
 10 Mr Lockey said that the court below looked very
 11 closely at the prevention of access issue and I agree
 12 that they did, but unfortunately having taken the wrong
 13 starting point of an overly narrow approach to what
 14 prevention of access involves and I just want to remind
 15 you again of his concession at 310, because it is
 16 important to focus in this, recorded in paragraph 310 at
 17 page 122 of the judgment {C/3/122}. I did refer you to
 18 this passage but it is worth reminding you again.
 19 Towards the bottom of the paragraph, bottom third or so:
 20 "... Arch accepts that there was prevention of
 21 access to business in Category 2... in relation to
 22 businesses in Category 1 which did not previously
 23 provide takeaway services, access was prevented because
 24 they could not be open to customers without the
 25 policyholder making a fundamental change to the nature

1 of the business."
 2 At 326 {C/3/126}, which is at page 126:
 3 "Mr Lockey fairly and properly accepts that the
 4 impossibility in question does not need to be physical
 5 or legal [because he had advice in his policy]... His
 6 concessions in relation to the pub and restaurant which
 7 started a takeaway service in lockdown or the theatre
 8 which started remote performances on the internet are
 9 well made... that entails a fundamental change... as
 10 described in the policy schedule [and] must be
 11 prevented."
 12 He accepts there is a prevention of access if no one
 13 can go to a restaurant as a restaurant, but the owners
 14 and the staff are free to come and go as they wish from
 15 the premises, for example to cook themselves meals. And
 16 they are free after the prevention of access which
 17 closes down their restaurant to start up a takeaway
 18 business without, on Mr Lockey's analysis, there being
 19 a prevention of access. But, he says, there is no
 20 prevention of access if in addition to cooking meals for
 21 themselves before the lockdown they had also been
 22 cooking takeaway meals. This, we submit, is a wholly
 23 arbitrary and nonsensical distinction.
 24 The example we gave, similar to my Lord Lord Reed's
 25 example of Boots the Chemist, was of a department store

1 with a small pharmacy by the front door and the whole
 2 department store is closed. No one can come in and no
 3 one is allowed in, even if the store was open, no
 4 members of the public were allowed in, but anyone can
 5 come in to buy something at the pharmacy. Mr Lockey
 6 would say there is no prevention of access. But of
 7 course if the department store said, "Well, we'd like to
 8 give our staff something to do, why don't we open, and
 9 the public needs access to pharmacies, why don't we set
 10 up a temporary pharmacy in the store?" Then there would
 11 be a prevention of access even though people are now
 12 coming into the store to visit the pharmacy. We submit
 13 that this is really cloud cuckoo land.
 14 Then Mr Lockey said something about trends clauses
 15 which is relevant to our ground 1, so I have on that
 16 a full right of reply as well.
 17 He seemed to suggest that I'd submitted that there
 18 was some settled meaning to these clauses. I've never
 19 said that there is something that the law would
 20 recognise as a settled meaning. My submission was, as
 21 I believe my Lord Lord Leggatt understood it, that when
 22 one looks at the origin and genesis of these clauses, as
 23 revealed by all the textbooks going back many years, one
 24 can see what their commercial purpose actually was.
 25 That is revealed by those texts and that is the

1 background against which one construes the policy. It's
2 traditional in all contracts to have regard to the
3 genesis and origin of a contract or a clause when one is
4 construing it and this revealed what the commercial
5 purpose of these trends clauses actually was.

6 When it comes to the application of a clause like
7 Mr Lockey's with prevention of access of requirement,
8 what you're doing is, as I've submitted, adjusting
9 access-related losses. In some cases the exercise may
10 be simple, as with my church donor example. In other
11 cases, it may be more complex but the target is the
12 same. The travel agent example, the calculation of
13 access-related losses is, of course, affected by the
14 separate legal prohibitions on travel. But they would
15 still have to be assessed. One might, for example,
16 assess them by reference to how online tour operators
17 did in the lockdown as compared to the tour operator who
18 only operated from a shop.

19 Now for Mr Gaisman's submissions. He referred to
20 the meaning of the word "imposed" and said no one would
21 have contemplated non-legal action. Well, my simple
22 answer to that is: look at the Arch policy. It
23 contemplated prevention of access for advice by
24 an authority.

25 Of course I'm not going to suggest that people would

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1 have had in mind what the government just did, but the
2 fact that non-binding things might be said or done that
3 prevented access in that case was apparent and it was
4 obvious there that the sort of advice being contemplated
5 in Arch was something that one had to comply with. The
6 mere fact that one doesn't anticipate the government
7 lockdown as occurred doesn't mean that the clause
8 doesn't apply to it.

9 In all circumstances, we have a situation which
10 emerges and one has to consider whether or not the
11 policy language applies to it.

12 In relation to Zurich's submissions, I will just
13 make sure there is nothing else in Mr Crane.

14 In Mr Orr, he said that no one would possibly
15 suggest that there was a trend — my Lord, sorry, yes,
16 Lord Leggatt. You're on mute, my Lord.

17 LORD LEGGATT: I just wanted to ask, Mr Edelman, we have to
18 deal with Zurich's policy in addition to all the others
19 when it appears that the point on it is completely
20 academic and doesn't affect any policyholder as opposed
21 to all the other points which affect a lot of people
22 very importantly?

23 MR EDELMAN: Well, I just ask my Lord to remember that these
24 are just eight insurers which have been selected from
25 a large number of insurers and certain clauses have been

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1 selected, but I am told that there are a lot of other
2 policies out there which just use the word "action".

3 LORD LEGGATT: So there are some other policies, in fact,
4 where the point does matter, is what you're telling us?

5 MR EDELMAN: Yes, yes, and that's why we're appealing it and
6 of course ordinarily one wouldn't, but it's because this
7 is a test case with selected policies which have
8 a variety of points in them, the fact that Zurich
9 needn't worry about this clause doesn't mean that the
10 meaning of the concept of "action" in this sort of
11 clause isn't significant.

12 LORD LEGGATT: Thank you.

13 MR EDELMAN: All I submit about that is that no one else has
14 made the concession and Mr Orr said it's not a trend but
15 you'll notice he didn't say whether or not it was
16 a circumstance. Of course, it might not be a trend but
17 the policy, they also say, it applies to circumstances
18 and that's a point they take.

19 So can I deal with briefly with the points he made
20 on action and he suggested, if we go to tab 18,
21 page 1406 in bundle C {C/18/1406} that the fact that the
22 policy refers to order or advice in another clause, this
23 is clause 3 on page 1406 {C/18/1406} is relevant when
24 one construes the word "Action" which appears on the
25 previous page at 1405 at the top {C/18/1405}.

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1 Firstly, we say the draftsman has chosen different
2 words, so we don't see that there's any contextual issue
3 at all. In one it's used order and advice, in the other
4 action, but actually if you wanted to do anything by
5 context you would say "action" encompasses both and
6 action has a naturally broad meaning of meaning simply
7 an act or thing done and we say that that is sufficient.
8 I'll see if there's anything else that Mr Orr said.

9 He then gave the origin of this clause with
10 terrorist activities. In fact if you look at the texts
11 that he cites, there is a different form of words that's
12 used. This form of language has been adapted from that
13 and the words have changed, but in any event even if the
14 clause does have its origin in a particular type of
15 danger or emergency, that doesn't tell you what the word
16 "action" means in this clause, which is not confined to
17 terrorist activities, it just maybe that someone got
18 this idea of this form of extension because of that, and
19 they used the word "action" which is a general word.

20 He talked about cordons, but what cordons have to do
21 with this we fail to understand. That may be one way in
22 which access is interfered with, but it's not the only
23 way. We also don't accept that cordons always involves
24 a breach of the law to cross a police cordon. It may
25 depend on the precise circumstances in which the cordon

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1 has been erected and for what purposes.
 2 But we needn't really go into that because there's
 3 nothing to suggest that this is actually limited to
 4 police cordons. Yes, it refers to police but it also
 5 refers to competent local, civil or military authority.
 6 It covers absolutely every single authority that there
 7 is, and so police cordons have nothing to do with it.
 8 Then I think the next submission I have on his
 9 approach is access will be prevented and that's where
 10 again he prays in aid these old clauses. I've just
 11 found in my note the old clause said "close down or
 12 sealed off". You'll notice those words, instead of
 13 "access will be prevented" it was "closed down or sealed
 14 off", which in my submission is a very different
 15 meaning.
 16 My Lords, can I just check that I don't need to say
 17 anything more about those issues? I think I've managed
 18 to zoom through it even more quickly than I had
 19 anticipated I would do. I obviously wait to see if
 20 anybody sends me a message saying that I've missed
 21 anything out, but otherwise I might have to hand over to
 22 Mr Lynch a bit early, unless there's any questions that
 23 the court wishes to ask me in the few minutes that are
 24 remaining. I've tried in my reply to simply focus on
 25 the important points that have been made, rather than

1 covering everything again. I've tried to do it
 2 succinctly.
 3 My Lords, I would ask Mr Lynch, if I'm handing over
 4 to him a bit early, to certainly leave me a few minutes
 5 at the end because there are just some matters I wish to
 6 raise which are not related to the issues in the appeal
 7 themselves, but to do with matters of obviously thanking
 8 the court, and matters of (inaudible) the judgment.
 9 I don't want to hold up Mr Lynch, who I'm sure is
 10 chomping at the bit to get started. He may have more
 11 than his allotted five minutes because he can have five
 12 of mine.
 13 LORD REED: Thank you very much, Mr Edelman.
 14 In that case, we'll turn now to Mr Lynch.
 15 Submissions in reply by MR LYNCH
 16 MR LYNCH: My Lords, I'm grateful. I may need the extra
 17 time just to work out how the video works again. I'm
 18 sorry about this. There seems to be some issue with it,
 19 but there we are. Thank you. Thank you for your
 20 patience.
 21 My Lords, I have only one point to address in reply
 22 and obviously I'm very grateful to my learned friend
 23 Mr Edelman for the extra time, which I suspect I will
 24 not need and he will have the extra time he requires.
 25 I just address one point, which is my learned friend

1 Mr Gaisman's reference to paragraph 268 of the judgment
 2 and his assertion that there's nothing wrong with it,
 3 linked with my answer to my Lord Lord Leggatt's question
 4 to me concerning inability to use and that question was
 5 posed to me today, draft transcript, page 46, line 13 to
 6 line 25 {Day4/46:16}.
 7 Just by way of reminder of that question my Lord
 8 Lord Leggatt put to me that:
 9 " ... on the other hand, let's suppose that you can
 10 use the premises but many fewer people can come in
 11 because you have to or you are observing social
 12 distancing and so you ration the number of people who
 13 can come in. You couldn't say that that was
 14 an inability to use, could you?"
 15 Now, my Lord's question, which must, of course, have
 16 been directed at businesses that remained open but have
 17 fewer customers or employers attending the premises,
 18 might be, for example, an off-licence which remained
 19 open but only allowed two or three customers at a time.
 20 Now, this helpfully brings us to a number of
 21 questions, we would respectfully submit, with
 22 paragraph 268 of the judgment {C/3/112}. We would draw,
 23 first, an immediate and important distinction here
 24 between, for example, shops which were expressly
 25 permitted to remain open and those where no direction

1 was given under the regulations.
 2 Those businesses where no directions were given, for
 3 example an accountancy firm, were generally and very
 4 significantly affected by, for example, regulation 6.
 5 That prevented both customers and importantly employees
 6 from attending the business without one of the narrow
 7 reasonable excuses under the regulations.
 8 There was, in our respectful submission, a clear
 9 inability to use for those businesses due to
 10 restrictions imposed precisely because of regulation 6.
 11 The fact that employees of many such businesses could
 12 work from home simply goes to quantum rather than
 13 liability.
 14 On the reduced use point generally, another example
 15 is the cinema that can be still used for remote
 16 transmission or the church being used for funerals.
 17 There would be an inability to use for most normal
 18 business purposes although no part has an inability to
 19 use for all purposes. It means, as earlier examples we
 20 have considered during this hearing demonstrate, for
 21 example the golf club, Boots, the restaurant, only in
 22 our respectful submission would an unreasonably narrow
 23 category of businesses fall within the approach set out
 24 in paragraph 268 of the judgment {C/3/112}.
 25 Turning back to my Lord's question, businesses which

1 were expressly permitted to remain open which is, as
 2 I understand it, those businesses being considered in my
 3 Lord’s question, can be and often were also affected by
 4 regulation 6 and by other restrictions . For example,
 5 social distancing.
 6 The answer given in our written submissions is that
 7 whether or not there has been an inability to use will
 8 be determined on the facts and the test we propose is
 9 whether this causes a material inability to use the
 10 premises for the insured’s normal business activities .
 11 Please see our application for permission to appeal,
 12 paragraphs 38 to 44 {A/2/51} to {A/2/53}, the FCA appeal
 13 written case from paragraph 75 to 84 at {B/2/56} to
 14 {B/2/59} and our appeal written case from paragraphs 45
 15 to 55 at {B/3/92} to {B/3/97}.
 16 As I said in answer to my Lord’s question in
 17 opening, it is a matter of fact and degree but to be
 18 tested by reference to a standard of material inability
 19 to use the premises for the insured’s normal business
 20 activities . With respect, this is the approach that
 21 should have been taken at paragraph 268 of the judgment
 22 {C/3/112}.
 23 My Lords, I’ve used my five minutes and those are my
 24 submissions in reply . That allows Mr Edelman,
 25 I believe, the time that he requires to make his further

1 points. Unless I can assist your Lordships further?
 2 LORD REED: Thank you very much, Mr Lynch.
 3 Mr Edelman.
 4 Further submissions by MR EDELMAN
 5 MR EDELMAN: Yes, my Lord, as always is the case there was
 6 a point that I forgot to mention. It’s a very short
 7 point and it was on the statement that the
 8 Prime Minister made on 16 March, which Mr Kealey raised
 9 which is about the restaurant point and it’s a very
 10 short point. It’s {C/29/1783}.
 11 He said that at that page, just above the middle of
 12 the page:
 13 "We need people to start working from home where
 14 they possibly can. And you should avoid pubs, clubs,
 15 theatres and other social venues."
 16 Then he made the point that on 1784 {C/29/1784} at
 17 the top of the page, you see about Londoners at the
 18 bottom of the line:
 19 "... [they] should avoid confined spaces such as
 20 pubs and restaurants".
 21 And said that restaurants were only closed done in
 22 London. We submit that it was obvious from the context
 23 of that that other such social venues, pubs, clubs and
 24 theatres, and when he goes on to mention pubs and
 25 restaurants in relation to London, other such social

1 venues obviously meant restaurants. It’s simple.
 2 That’s all I wanted to say on that.
 3 Now the final points I wanted to raise with my
 4 Lords, firstly , there’s one thing to mention and that is
 5 the position of Ecclesiastical . You’ll see that they
 6 are respondent to the appeal. That’s because although
 7 they succeeded on an exclusion clause, they likewise
 8 have an element of their clause which is the subject of
 9 a declaration because it wasn’t just a general
 10 declaration , declarations were made as to each element
 11 of the relevant clauses because this was a test case.
 12 That element of their clause will be affected. They’ve
 13 agreed not to take part in these proceedings and to be
 14 bound by the result because their policy doesn’t raise
 15 any separate issue. I just wanted my Lords not to be
 16 taken by surprise in due course when, at the decision
 17 stage and declarations, insofar as they are modified,
 18 involve Ecclesiastical . There’s nothing for my Lords to
 19 consider. You have the submissions as they are, but
 20 just so my Lords were aware of the fact that no
 21 additional issues raised, but they are a respondent to
 22 the appeal so the declaration against them can be
 23 changed if necessary and appropriate.
 24 LORD REED: Did they enter appearance as respondents by
 25 putting in a notice of objection?

1 MR EDELMAN: No, my Lord, they didn’t.
 2 LORD REED: Well, our rules — we might have think to —
 3 I don’t want to go into it now but you might want to
 4 think what the implications are of are rules.
 5 MR EDELMAN: Well, my Lord, I think on the basis that this
 6 was a test case and really it was just a matter of
 7 sorting the out — making the declaration in relation to
 8 them consistent with everybody else.
 9 LORD REED: Yes, I see.
 10 MR EDELMAN: Because they are going on — when the
 11 declarations are made, whatever they are, they will be
 12 publicised by the FCA.
 13 LORD REED: Yes.
 14 MR EDELMAN: And it was not — it was thought not desirable
 15 to have inconsistent declarations as the final result .
 16 LORD REED: Yes.
 17 MR EDELMAN: We want to have a consistent pattern.
 18 LORD REED: I understand that. So I dare say once you have
 19 a judgment or judgments you will then want time to —
 20 an opportunity to try to agree the terms of the
 21 consequent orders?
 22 MR EDELMAN: Yes, absolutely, and that’s the — before I get
 23 to the very final matter, obviously I need to echo all
 24 the thanks that have been expressed so far to my Lords
 25 for hearing this case with such expedition and patience,

1 particularly patience to me. I am very grateful for
 2 that. But obviously, having thanked you for the
 3 expedition and the patience, comes the very awkward
 4 question about timing of a judgment. I know this is
 5 something that parties wouldn't ordinarily ask about.
 6 LORD REED: Yes.
 7 MR EDELMAN: We would expect it when it comes, but in the
 8 current circumstances I hope my Lords appreciate this
 9 question being asked.
 10 LORD REED: Yes. Well, I can tell we haven't yet discussed
 11 the case, so I don't know, for example, if we're of the
 12 same mind or if we're liable to be a range of views.
 13 That has a major effect on how quickly judgments take to
 14 be issued. We have taken steps to try to organise the
 15 lists in such a way that people should have more time
 16 than they ordinarily would have to devote to writing
 17 judgments, because we're well aware of the practical
 18 importance of the judgment, particularly for the
 19 businesses that are affected, and we will do what we can
 20 to produce a decision just as quickly as we can. But
 21 whether that will be before Christmas or sometime in
 22 January, I can't tell you.
 23 MR EDELMAN: No, my Lord, I appreciate that because, as I've
 24 explained and I have explained to those instructing me,
 25 this case was already squeezed into the list .

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1 LORD REED: Yes.
 2 MR EDELMAN: So it's not as if there was already a gap in
 3 the diary for it .
 4 LORD REED: No. Unfortunately, it's had to be squeezed in
 5 along with other cases being squeezed in, which, for
 6 other reasons, are also in their own way very important.
 7 So we'll do what we can, obviously, and we can keep the
 8 parties' solicitors informed of what the likely
 9 timetable looks like .
 10 MR EDELMAN: That would be very much appreciated if that was
 11 possible. Just so expectations can be managed amongst
 12 all the policyholders .
 13 LORD REED: Yes.
 14 MR EDELMAN: The FCA and the insurers, I'm sure, will be
 15 realistic about it, but it would be helpful for the FCA
 16 to be able to update policyholders about where things
 17 stand.
 18 LORD REED: Yes.
 19 MR EDELMAN: I'm very grateful to my Lords and that's all
 20 I have to say, apart from reiterating my thanks --
 21 LORD REED: Well --
 22 MR EDELMAN: -- and of course our thanks to the transcribers
 23 and all the court staff who have made all the video link
 24 arrangements possible and operate so smoothly.
 25 LORD REED: Well, for our part, we're grateful to all

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1 counsel, particularly for managing the hearing in such
 2 a disciplined way that we got through it as smoothly as
 3 we did. As I say, we'll now start putting our heads
 4 together and let you have a decision as quickly as we
 5 can manage. Thank you very much.
 6 The court will now adjourn.

7 (4.01 pm)

8 (The court adjourned)

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