

BUSINESS INTERRUPTION INSURANCE TEST CASE

DRAFT TRANSCRIPT

OF DAY 5 OF TRIAL (27 JULY 2020)

Pursuant to paragraph 30 of the court's order made on 26 June 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 5

July 27, 2020

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1 Monday, 27 July 2020
 2 (9.58 am)
 3 Submissions by MR TURNER (continued)
 4 LORD JUSTICE FLAUX: Yes, Mr Turner.
 5 MR TURNER: Could I start by correcting two references from
 6 Thursday. The first -- sorry, my Lord, your microphone
 7 is still on, so I am getting feedback.
 8 Two reference corrections from Thursday. The first
 9 transcript reference {Day4/156:18}, the correct bundle
 10 reference for paragraph 2.10 of Riley, which contains
 11 the rationale for the material damage proviso, is
 12 {K/233/1}. Then transcript reference {Day4/160:6}
 13 Mr Edelman's reference to each line in the spreadsheet
 14 making its concurrent contribution to the cause, the
 15 correct reference is {Day2/140:21} to page 141 line 5.
 16 Could I pick up with where we were in relation to
 17 RSA2. We had been looking at the relevant insuring
 18 provision, which is the public emergency extension,
 19 which your Lordship will find in RSA2.1 at {B/17/36}.
 20 You will recall that in answer to a question from
 21 my Lord Mr Justice Butcher, I had suggested that the
 22 insuring provision should be read as if there were
 23 a comma after the word "emergency" in the second line,
 24 and another comma after the word "property".
 25 In short, our submission remains that it is the

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1 emergency which needs to be in the vicinity. We deal
 2 with this at paragraph 23 of appendix 2 to our written
 3 submissions which is bundle {1/18/38}.
 4 In summary, normally an emergency and any relevant
 5 threat to life and property will be co-located. But if
 6 one steps back from the prism of COVID-19, the broad
 7 purpose of this clause is to provide an indemnity
 8 against the effect on access to insured premises of
 9 restrictions imposed by the emergency services, in the
 10 context of the emergency services dealing with
 11 emergencies.
 12 By their very nature emergencies, which affect
 13 access to the premises are likely to be in the vicinity
 14 of the premises. Conversely, action taken to address
 15 emergencies in other areas are unlikely to cause
 16 disruption to access to the premises.
 17 We can test that by taking the following scenario,
 18 which is perfectly plausible in the context of the
 19 police imposing cordons under section 33 of the
 20 Terrorism Act 2000:
 21 Let's take the scenario where a cordon is imposed by
 22 the police who are acting on intelligence and the
 23 purpose of the cordon is to allow area A to be searched
 24 for detonators for a bomb. By themselves the detonators
 25 are harmless, but when they are combined in area B with

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1 fertiliser currently stored in area C, they can lead to
 2 the endangerment of life and property in area B, where
 3 the bomb is going to be put together and planted.
 4 The disruption of access to the premises in area A
 5 due to the police cordon is precisely the sort of event
 6 which one would expect to trigger the coverage under
 7 this sort of clause. Indeed, we say it would be odd if
 8 the coverage were not triggered simply due to the
 9 dislocation of the emergency in area A from the area in
 10 which life or property would be endangered.
 11 Can I then turn, please, to sub-exclusion (b), which
 12 is the sub-exclusion during any period other than the
 13 actual period when access to the premises was prevented.
 14 We say this means what it says. Its effect is to
 15 delineate the peril insured. Why the draftsman has
 16 chosen to use an exclusion to delineate the peril does
 17 not matter. We say that given the speeches of Lords
 18 Hodge and Toulson in Impact Funding at paragraphs 32 and
 19 35, and just for the transcript the reference is
 20 {J/122/13} to page 14, we say that such an approach to
 21 drafting cannot be characterised as an obvious error
 22 which the court can correct by an application of the
 23 Chartbrook Leasing principle.
 24 Nevertheless, the FCA's oral submissions in effect
 25 invite the court to apply Chartbrook Leasing, and in

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1 response to that we say the following:
 2 First, if this truly were an obvious error, the FCA
 3 would have taken the point in its reply; it did not do
 4 so. Again if it were an obvious error, it would have
 5 taken the points in its written submissions; it did not
 6 do so.
 7 Paragraph 87 of the written submissions identify the
 8 exclusions which the FCA said were in issue, {1/1/38};
 9 they do not include the sub-exclusion within the public
 10 emergency extensions in the Eaton Gate RSA2 policies.
 11 Indeed, the FCA's position, at least until
 12 Mr Edelman commenced his oral submissions, and as set
 13 out in paragraph 621 of its skeleton argument at
 14 page 212 of the document on the screen -- could we see
 15 that, please {1/1/212} -- was that this is a standard
 16 form contract of a professional insurer. The reasonable
 17 reader would assume that care had been taken by those
 18 drafting and selling the policy, and any mistake would
 19 have been spotted and corrected.
 20 If one assumes that we are correct as to the
 21 construction of sub-exclusion (e), there is then an
 22 issue as to the meaning of the word "prevented". We say
 23 that that requires a prohibition on the means of access
 24 and egress to and from the premises and we adopt
 25 Hiscox's submissions at paragraphs 108 to 115 of their

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1 skeleton argument; reference {1/13/37} to 39, on which
 2 you may or may not shortly hear Mr Gaisman.
 3 Sorry, that should be sub-exclusion (b), not (e).
 4 We then move to the question of the correction of
 5 sub-exclusion (e) in RSA2.2., the page reference is 51.
 6 My Lords, it is a short point, and you are either
 7 going to be with me or against me. It is a statement of
 8 the blindingly obvious. We say that there is an obvious
 9 mistake. As formatted, the exclusion does not read
 10 grammatically or naturally .
 11 The fact of the mistake is both corroborated and
 12 made more obvious by considering the other extensions
 13 within the wording. Quite apart from the business
 14 interruption extensions at (b), (c) and (g) to which
 15 Mr Edelman drew your attention on Wednesday, those are
 16 at pages 50 to 51 of the wording, and all involve
 17 freestanding inner limits . There are a further eight
 18 extensions with freestanding inner limits in the
 19 material damage section, pages 21 to 23 of the wording.
 20 There are 14 extensions with freestanding inner limits
 21 in section 2, the contents section , pages 25 to 28 of
 22 the wording. There is a formatting error in relation to
 23 extension 2 of the contents section at page 26. If we
 24 could see that {B/18/26}.
 25 If we can go back to the previous page so you can

1 see how this is set up. So removal of debris , what is
 2 not covered: any costs or expenses, and if the draftsman
 3 wasn't allergic to punctuation he might have put a colon
 4 there .
 5 Then over the page, (a), (b), and (c), so what is
 6 not covered: any costs or expenses, any amount exceeding
 7 the sum insured on trade contents. More naturally that
 8 would have been a freestanding exclusion all by itself ,
 9 but again, it appears that there has been a slight
 10 formatting error there, albeit not one that could
 11 conceivably give rise to doubt or scope for argument
 12 about its meaning.
 13 There is one extension in section 3(b), and the
 14 reference for that is {B/18/32} of the policy. You will
 15 see extension capital A on page 32, and we gave an
 16 incorrect reference to that in paragraph 30(b)(iii) of
 17 appendix 2 to our skeleton argument, page {1/18/41}, we
 18 gave the wrong reference, but it is the extension on
 19 page 32 to which we should have referred .
 20 There are then three further extensions in section 5
 21 of the wording, on page 36, which include freestanding
 22 inner limits .
 23 So if one steps back, there are a total of
 24 28 extensions within this policy wording, excluding the
 25 one that you are concerned with, with freestanding inner

1 limits , albeit one has been incorrectly formatted.
 2 There is only one extension , the public emergency
 3 extension on page 51, with an inner limit expressed in
 4 ungrammatical terms on the same line as an exclusion .
 5 We say in respect of both correct grammar and
 6 consistency with the other policy terms, that could be
 7 achieved or those aims could be achieved by making the
 8 correction which we propose.
 9 My Lord, those are my submissions in relation to
 10 RSA2.
 11 I am now going to move, if I may, to RSA3 for which
 12 our written submissions are set out in appendix 3,
 13 reference {1/18/49} and following.
 14 The wording itself is at tab 19 of bundle B.
 15 {B/19/3} under the heading "Insuring Clause" the third
 16 paragraph down has a one document provision. The
 17 relevant insuring clause is to be found at
 18 page {B/19/38}. You have already seen it . Extension
 19 (vii):
 20 "We shall indemnify you in respect of interruption
 21 of or interference with the business during the
 22 indemnity period following ..."
 23 Then (iii):
 24 "any occurrence of a notifiable disease within
 25 a radius of 25 miles of the premises."

1 You were taken to one of the clauses which followed
 2 a sub-heading at the bottom of page 38, "Additional
 3 definition in respect of Notifiable Diseases", a heading
 4 which might more naturally read "Special conditions in
 5 respect of Notifiable Diseases".
 6 You were taken just to item 4, but could I ask you
 7 to start at item 2 of the additional definition .
 8 "For the purposes of this clause:
 9 "Indemnity period shall mean the period during which
 10 the results of the business shall be affected in
 11 consequence of the occurrence discovery or accident ..."
 12 The words "occurrence discovery or accident" are
 13 deliberately chosen to hark back, if we can go back to
 14 page {B/19/38}, to the different triggers for cover
 15 within the infectious diseases exclusion , so
 16 sub-extension (a) has occurrence, discovery or
 17 occurrence, (b) is discovery , (c) is accident and then
 18 (d) is occurrence.
 19 Go back to page 39, please , and then item 4 you were
 20 taken to, which is:
 21 "We shall only be liable for the loss arising ought
 22 those premises which are directly affected by the
 23 occurrence discovery or accident ..."
 24 Could I ask you to note the basis of settlement
 25 provisions which apply. Those can be found on pages 34

1 to 35, {B/19/34} to 35. Could you go there, please.
 2 On page 34 is the basis of settlement if the
 3 coverage is written on a gross profit basis. Item (b):
 4 "The insurance is limited to loss of gross profit
 5 due to ..."
 6 Item (b):
 7 "The sum produced by applying the rate of gross
 8 profit to the amount by which the turnover during the
 9 indemnity period shall fall short of the standard
 10 turnover in consequence of the incident ..."
 11 And the "in consequence of" formulation again
 12 appears in the first subclause beneath that in the third
 13 line.
 14 You will find similar wording in the gross revenue
 15 basis settlement clause which follows.
 16 There is also a special provision --
 17 LORD JUSTICE FLAUX: Where do I find the definition of
 18 "incident", Mr Turner?
 19 MR TURNER: The definition of "Incident" includes "material
 20 damage". Let me just ... it is page 33, my Lord.
 21 {B/19/33} item (a). I think we looked at it on Thursday
 22 afternoon.
 23 So this falls within the overall scope of the
 24 submissions I was making on Thursday afternoon about the
 25 engagement of the quantification machinery within the

1 non-damage extensions to various policies.
 2 Back on page {B/19/34} there is also, under the
 3 heading of "Vicinity", a special provision applicable to
 4 the extension which is a trends or adjustment clause.
 5 I use those words as shorthand and as shorthand only.
 6 But again, those words impose a requirement to conduct a
 7 "but for" analysis for the purposes of the
 8 quantification of loss. Again on the assumption that
 9 that provision is engaged by a non-damage extension, as
 10 we say it is.
 11 Moving on, could I go forward to page {B/19/91}.
 12 The start of the general exclusions which are expressed
 13 to apply to all sections of the policy unless otherwise
 14 stated. One sees that at the top of page 91.
 15 Then on page 93, you have already seen general
 16 exclusion L, which is stated to be applicable to all
 17 sections other than the employers and public liability
 18 covers, and it is then headed "... Contamination or
 19 Pollution Clause".
 20 In the context of its heading of "... Contamination
 21 or Pollution Clause" could I then take you to page
 22 {B/19/86}, where you have general conditions in relation
 23 to interpretation, some of which are numbered and some
 24 of which at random are not. Under 10.9 you will find
 25 a separate general condition in relation to

1 interpretation:
 2 "In this policy ...
 3 Then item (e):
 4 "The headings are for reference only and shall not
 5 be considered when determining the meaning of this
 6 policy."
 7 My Lord, there are, I would suggest, three
 8 particular --
 9 MR JUSTICE BUTCHER: You draw our attention to that because
 10 that is a point against you, effectively.
 11 MR TURNER: No. Mr Edelman relies on the heading "...
 12 Contamination or Pollution Clause" for the purpose of
 13 construing the subclauses which follow. He explicitly
 14 did so in his oral submissions.
 15 MR JUSTICE BUTCHER: Okay. I mean, in a sense it just
 16 doesn't really help very much.
 17 MR TURNER: I'm going to move on for now, my Lord, but we
 18 will come back to it in a moment.
 19 My Lord, there are three issues specific to RSA3 at
 20 a high level. I am going to address two of them this
 21 morning.
 22 The first one is: does the word "following" within
 23 the relevant insuring provision indicate a requirement
 24 for a looser test than "proximate causation"?
 25 The second is the proper construction and effect of

1 general exclusion L.
 2 The third would be the relevance and effect of the
 3 adjustments special provision, but I'm not going to
 4 address that separately in oral submissions because it
 5 comes under the cover of the submissions which I made on
 6 Thursday afternoon at a level of generality. And you
 7 know that we say that that provision does apply to
 8 non-damage extensions, and we say it should be construed
 9 and applied in a manner which is faithful to its
 10 wording.
 11 Turning to the first of the two issues which I am
 12 going to address, which is: does the word "following"
 13 import a requirement for a looser test than "proximate
 14 causation"? The starting point is section 55 of the
 15 1906 Act and the requirement that a proximate causal
 16 relationship is required unless the policy provides
 17 otherwise.
 18 In making its assessment as to whether the policy
 19 does otherwise require, the court should not draw nice
 20 distinctions between varieties of phrases used; and for
 21 that we cite the Insurance Disputes book at
 22 paragraph 7.14, reference {K/204/8} to page 9. The
 23 relevant text is based upon Lord Justice Potter's
 24 judgment in the Court of Appeal in the Lloyds TSB v
 25 General Insurance case and Lord Justice Potter was

1 himself citing Lord Sumner's speech in Becker Gray at
2 {J/42/12}, and we looked at that passage on Thursday.
3 MacGillivray is at one with the Insurance Disputes book
4 on this point at paragraph 21-004, reference {K/203/4}.

5 Both Insurance Disputes and MacGillivray confirm
6 that clear words are required to displace the
7 requirement of proximate causation.

8 Our starting point is that the word "following",
9 even if it were to be construed in isolation, would not
10 displace the requirement for proximate causation, but
11 your Lordships don't need to consider the word in
12 isolation, because the extension includes two special
13 conditions which confirm beyond scope for a sensible
14 dispute that "following" should indeed be construed as
15 requiring proximate causation.

16 First, special condition or additional definition
17 number 2 and if we could see that, please, on the
18 screen, it is at page 52 -- sorry, it is not. It is
19 page 39. {B/19/39}. This is the provision to which
20 Mr Edelman didn't refer on Wednesday, despite it being
21 cited in our written submissions. That clause, we say,
22 confirms that the extension requires that the results of
23 the business must be affected, and I quote, "in
24 consequence of" the occurrence of notifiable disease
25 within 25 miles of the premises. And the words "in

1 consequence of" have long been recognised as indicating
2 a requirement for proximate causation; and we refer you
3 to MacGillivray.

4 MR JUSTICE BUTCHER: Sorry, could you just point out,
5 Mr Turner, the precise words?

6 MR TURNER: "For the purposes of this clause:
7 "Indemnity period shall mean the period during which
8 the results of the business shall be affected in
9 consequence of the occurrence discovery or accident ..."

10 The words "in consequence of" have long been
11 recognised as indicating a requirement for proximate
12 causation, and I would refer you to MacGillivray again
13 at paragraph 21-004.

14 Second, the fourth special condition or additional
15 definition, which is the clause that Mr Edelman did
16 refer you to on Wednesday, confirms that the extension
17 provides an indemnity only for loss arising at those
18 premises directly affected by the occurrence.

19 The use of the words "directly affected" make clear,
20 again we say beyond scope for dispute, that indirect
21 effects of the occurrence are not encompassed within the
22 extension. Again, it is only consistent with
23 a requirement for proximate causation.

24 If one were to take the example at paragraph 219 of
25 the third and fifth defendants' skeleton argument, that

1 is {I/12/114}, that provides a rather meatier example of
2 the distinction encompassed within special definition or
3 additional definition 4, in operation than the example
4 given by Mr Edelman of cleaners. And we say that that
5 is consistent with a requirement that the losses of the
6 insured should be proximately caused by the peril and
7 therefore the "following" is to be construed in that
8 way.

9 The FCA for its part, in its oral submission,
10 submitted in terms that the word "following" recognised
11 that the notifiable disease peril would not be having
12 a direct effect of its own on the business. That was
13 {Day3/72:10} to 14, and we say that submission is very
14 obviously flawed.

15 First, it simply ignores additional definition 2 and
16 the light which it sheds on the meaning to be given to
17 the word "following" in the insuring clause.

18 Second, even indirect impacts require "but for"
19 causation, and we can take that from paragraph 18 of
20 Lord Phillips' judgment in the Blackburn Rovers case,
21 {K/119/6}.

22 Not only does the FCA ignore such basic principles,
23 it also, and we blatantly, ignores the language used in
24 special condition 4 which makes plain that indirect
25 impacts are not within scope.

1 If it is necessary to go further then, assuming you
2 are with me as to the relevance of quantification
3 machinery, one can also look to that as being consistent
4 with our analysis of the requirement for proximate
5 causation.

6 LORD JUSTICE FLAUX: Just remind us which paragraph of
7 Lord Phillips?

8 MR TURNER: It is paragraph 18, my Lord.

9 LORD JUSTICE FLAUX: Yes.

10 MR TURNER: Could I turn now to the proper construction and
11 effect of general exclusion L.

12 LORD JUSTICE FLAUX: Yes.

13 MR TURNER: The starting point is that all policy terms are
14 expressly subject to the general exclusions. General
15 exclusion L expressly applies to all sections of the
16 policy, with the exception of the employers and public
17 liability covers. As a matter of principle, the court
18 should seek to construe the policy in such a way as
19 would give all clauses effect. We set that out in
20 paragraph 29 of the joint skeleton argument on
21 construction. I/52/12. If we can see that, please.

22 Sorry, it is tab 5 I think. {I/5/12}. If we go to
23 the next page, please, {I/5/13}, could I ask you just to
24 read the quotation within that page, with particular
25 emphasis on what Lord Goff of Chievely said in the

1 Hong Kong case.
 2 Questions of repugnancy would only come into play if
 3 and only if it is not possible to fashion a construction
 4 of a relevant provision in such a way that they can live
 5 alongside each other, but even then the ability of the
 6 court simply to strike through exclusions would be
 7 limited, as Lord Justice Longmore's decision in Great
 8 North-Eastern Railways exemplifies; paragraph 31 of that
 9 decision, {K/96/7}.

10 My Lords, it is no accident, we say, that the FCA's
 11 oral submissions started and focused on the presence of
 12 the word "disease" within the exclusion in subclause
 13 (a). That is because the FCA, instead of heeding what
 14 Lord Goff said in the Hong Kong case, seeks to persuade
 15 you to conclude that there is an irreconcilable
 16 inconsistency between the disease extension and the
 17 exclusion for epidemic.

18 If one takes the example of the localised bread and
 19 butter outbreak of a notifiable disease, which was
 20 raised on the first day of the trial by my Lord
 21 Lord Justice Flaux, it is perfectly possible to give
 22 effect both to the disease extension and also to an
 23 extension for epidemic. Even though, as the FCA
 24 effectively and rightly recognises in paragraph 973 of
 25 its skeleton, the COVID pandemic amounts to an epidemic.

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1 The reference is {I/1/309}, we don't need to turn that
 2 up.

3 The FCA's next tactic, having set out to construe
 4 the provisions in a way which is designed to magnify
 5 inconsistency rather than resolve it, the next tactic is
 6 to seek to persuade you that the words "pollution and/or
 7 contamination" in subclause (a) bis, so the second
 8 subclause at (a), should be construed as having been
 9 intended to be a reflection of the title to this clause,
 10 {Day3/75:3} to line 6.

11 Leaving to one side the almost impenetrable opacity
 12 of subclause (a) bis, there are three obvious reasons
 13 why the FCA's submissions should be rejected.

14 First, if the parties had intended to refer back to
 15 the title of the clause so as to provide a guide for its
 16 interpretation, they would as a minimum have used the
 17 words in the same order as they appear in the title of
 18 the clause. They did not.

19 Second, the fact that the words "pollution and/or
 20 contamination" are in bold capitalised in (a) bis is not
 21 something on which it is possible to place the slightest
 22 weight. As we explain in paragraph 24, subparagraph (b)
 23 of appendix 3 of our skeleton argument, reference
 24 {I/18/61}, the words "pollution and contamination"
 25 appear in a number of places in the wording, emboldened

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1 and capitalised or unemboldened and uncapitalised,
 2 seemingly at random.

3 Third and fundamentally, the parties have expressly
 4 agreed that the heading is for reference only and cannot
 5 be considered to determine the meaning of the policy.
 6 Accordingly, we say that subclause (a) bis only applies
 7 to pollution and contamination, small "p" and small "c"
 8 because neither is a defined term within the policy.
 9 Even if it had been potentially capable of applying to
 10 a disease, the peril not excluded would be "disease not
 11 amounting to an epidemic". The subclause provides no
 12 assistance to the FCA.

13 In its oral submissions the FCA sought for the first
 14 time to shore up its position by reference to subclause
 15 (b) bis. You are certainly entitled to place at least
 16 forensic weight on the FCA's failure to draw attention
 17 to that subclause at any earlier stage, just as
 18 Mr Justice Morison did when confronted with a late
 19 developed argument of contractual construction in
 20 Eagle Star v Cresswell at paragraph 18, reference
 21 {K/115/10}

22 If we go back, please, to the wording of the
 23 exclusion. It is on the screen, so {B/19/93}. It is
 24 very difficult to divine the purpose of subclause (b)
 25 bis. Its language is ordinarily to be found as a saving

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1 or for the avoidance of doubt provision at the end of
 2 a policy endorsement, and it does not sit naturally as
 3 a component of an exclusion clause. Certainly it cannot
 4 and should not be construed in such a way as to defeat
 5 the very exclusions which have just been spelt out in
 6 the first subclause (a). If it makes any sense at all,
 7 we submit that it can only be as a limitation upon
 8 whatever carve out is made in subclause (a) bis.

9 LORD JUSTICE FLAUX: The last bit of it, and especially "the
 10 exclusion shall not be superseded by this clause" is
 11 really saying no more, isn't it, than to the extent
 12 there is a specific exclusion elsewhere in the policy in
 13 relation to what would otherwise be an insured peril,
 14 say, that this general exclusion doesn't supersede it,
 15 so it doesn't cut down the scope of any specific
 16 exclusion. Whether there is anything of that kind is
 17 obviously a different question, but as to what the
 18 purpose of the provision is, that seems to be at least
 19 a purpose, none of which, you would say, assists the
 20 FCA.

21 MR TURNER: We would say if that is the purpose it doesn't
 22 assist the FCA. We would proffer an alternative, which
 23 is that (b) bis is actually only referring to (a) bis,
 24 and then it makes sense. Quite what it adds is open to
 25 debate.

20

1 LORD JUSTICE FLAUX: Yes.
 2 MR TURNER: If one steps back, we say that you should give
 3 effect to general exclusion L.
 4 LORD JUSTICE FLAUX: We are spending a lot of time on this
 5 provision, and you only rely on it because you say it
 6 indicates an exclusion of epidemics.
 7 MR TURNER: Correct.
 8 LORD JUSTICE FLAUX: So you use it, in a sense, to shore up
 9 your primary argument on the notifiable disease
 10 provision, which is the relevant insuring clause.
 11 MR TURNER: Yes, but it could go wider because it could be
 12 engaged by a Leicester scenario.
 13 LORD JUSTICE FLAUX: I see what you mean. Yes, okay.
 14 MR TURNER: My Lord, you have my submissions. I am going to
 15 move on to RSA4. {B/20/1}
 16 Our submissions in relation to RSA4, we don't need
 17 to turn them up, are {I/18/70} and following.
 18 Appendix 4 to our written submissions.
 19 If we go to page 2 under the heading "Underwritten
 20 by RSA", you will see a one contract provision. If we
 21 jump forward, please, to page {B/20/51} which is in the
 22 sample schedule, there is cover for any one single
 23 business interruption loss, on page {B/20/51} and that
 24 term, "Single Business Interruption Loss" is defined at
 25 page {B/20/33}, and we are in definition 105,

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1 sub- definition (i):
 2 "With all business interruption loss ... and amounts
 3 payable under extensions that arise from, are
 4 attributable to or are in connection with a single
 5 occurrence ..."
 6 "Covered Events" in the definitions, page {B/20/23}.
 7 In the right-hand column, definition number 17 means the
 8 events, small "e", as described featuring in a number of
 9 insuring clauses including, so far as is relevant,
 10 clause 2.3.
 11 Just pausing there, we say that this is a policy
 12 which provides insurance against events, not states of
 13 affairs. We say that the COVID-19 pandemic is not an
 14 event in the ordinary usage of the term. Mr Edey said
 15 that the attempt to cross-refer to the aggregation
 16 cases, that is particularly to AXA v Field, doesn't hold
 17 water; the reference for his submission is {Day3/185:22}
 18 and following, but he didn't explain why. Neither
 19 aggregation nor the policy in this case require any
 20 special meaning to be applied to the word "event" and,
 21 as Lord Mustill observed in AXA v Field, page 1035 G
 22 {J/74/10}, the construction of the word "event" is
 23 a question of ordinary speech, and that is
 24 a construction which leads to it being something that
 25 happens at a particular time at a particular place in

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1 a particular way. It is not a cause, and it cannot be
 2 a continuing state of affairs.
 3 Can we go to page 7 of the policy then, {B/20/7}.
 4 "Business Interruption", the insuring clause 2.3,
 5 "Specified Causes":
 6 "In the event of interruption or interference to the
 7 insured's business as a result of ..."
 8 Then (viii):
 9 "Notifiable Diseases and Other Incidents."
 10 That is a defined term that we will come to in
 11 a moment. And criterion (d) is:
 12 "occurring within the vicinity [defined term] of an
 13 insured location
 14 "during the period of insurance."
 15 Then (xii) is "Prevention of Access - Non-Damage",
 16 again a defined term, with a time deductible of eight
 17 consecutive hours.
 18 We divide, for reasons that will become apparent,
 19 the clause 8 perils into two. So there is a notifiable
 20 disease peril and another incidents peril, and we will
 21 look at those in a moment.
 22 Business interruption loss definitions, you were
 23 shown by Mr Edelman page 32 of the policy -- sorry,
 24 page {B/20/23} of the policy has the definition of
 25 "Business Interruption Loss", which includes the

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1 reduction in turnover. Page {B/20/32} defines
 2 "Reduction in Turnover" as the amount by which the
 3 turnover falls short of the standard turnover.
 4 "Standard Turnover" is defined on the next page, page
 5 {B/20/34}, and requires adjustments to be made to take
 6 into account variations affecting the insured's business
 7 either before or after the covered event, or which would
 8 have affected the insured's business had the covered
 9 event not occurred, so that the figures thus adjusted
 10 will represent as nearly as may be reasonably
 11 practicable the results which but for the covered event
 12 would have been obtained during the indemnity period.
 13 So it invites and requires the application of
 14 a counterfactual for the purposes of quantifying loss.
 15 We say that is to be given its natural meaning, not the
 16 convoluted meaning advanced by the FCA.
 17 Before we move on to the definitions of the perils,
 18 could we look at the definition of "Vicinity", page
 19 {B/20/35}, common, it appears, in all of the perils with
 20 which you are concerned:
 21 "... an area surrounding or adjacent to an insured
 22 location in which events that occur within such area
 23 would be reasonably expected to have an impact on an
 24 insured or the insured's business."
 25 We say that that is a term which is plainly intended

24

1 to act as a limiting factor for the purposes of the
 2 insured perils . We say its meaning is to be divined at
 3 the date of inception of the policies , it is
 4 prospective . And there is a single --
 5 LORD JUSTICE FLAUX: You would say that the FCA's
 6 interpretation of this "Vicinity" definition focuses on
 7 the words "within such area would be reasonably expected
 8 to have an impact", and hence Mr Edelman's submits:
 9 well , that would encompass the entire country . But that
 10 really ignores the opening words, which is "an
 11 surrounding or adjacent to the insured location "
 12 MR TURNER: It ignores lots of things, my Lord . It ignores
 13 "surrounding or adjacent to" . It treats "events" as if
 14 it is referring to the specific insured event which has
 15 occurred , rather than engaging in a prospective
 16 exercise . And in so doing it puts a bright red line
 17 straight through "might reasonably be expected" .
 18 MR JUSTICE BUTCHER: It also ignores the meaning of the word
 19 "vicinity " and I seem to remember Lord Hoffmann had said
 20 that even if it is a defined term, the term which the
 21 parties are defining is itself an indication of what
 22 they may mean .
 23 MR TURNER: Your Lordship is quite right . You have in mind
 24 the Birmingham City Council case {K/129/5} .
 25 Sorry , could I ask my Lord Lord Justice Flaux to

1 mute?
 2 LORD JUSTICE FLAUX: Yes . Sorry .
 3 MR TURNER: If we go to {K/129/5}, and it is paragraph 11 .
 4 It is just by side letter F:
 5 "Although successor is a defined expression ..."
 6 My Lords, we deal with this submission in detail in
 7 paragraphs 26 to 32 of appendix 4 {1/18/10} and
 8 following . I am not going to repeat those submissions,
 9 it is obvious that you already have them well in mind .
 10 The oral submissions made by the hospitality
 11 interveners , in fact if we start with their written
 12 submissions at paragraph 86, {1/2/22} .
 13 You start with what has happened and then you work
 14 back . If you do that , it is no surprise that when you
 15 ask the question what area has been impacted, you get
 16 the answer: the whole of the UK . But that is not the
 17 question that is posed by the definition . If we look at
 18 what they said in their oral submissions, Day 3,
 19 page 182, lines 15 to 24 {Day3/182:15}:
 20 "... can only sensibly be a reference to whatever
 21 event has in fact occurred, in respect of which the
 22 insured seeks to establish cover."
 23 That is not an attempt to give effect to the policy
 24 definition , it is an attempt to subvert it , to rewrite
 25 it and to remove the vicinity requirement from the

1 policy .
 2 As to whether what has happened could reasonably
 3 have been expected, your Lordships need go no further
 4 than Mr Edelman did at {Day2/118:18} to line 21:
 5 "Insurers would have hoped and expected ..." that
 6 nothing as serious and as dramatic as what has happened
 7 to the country this year .
 8 Well, quite how the FCA or the hospitality
 9 interveners can say that what has happened could
 10 reasonably have been expected, which is a test which
 11 imposes a high degree of prospective probability , is as
 12 yet unexplained .
 13 Moving on from vicinity , could we go back to B/20
 14 and look at the notifiable diseases peril .
 15 Sorry , could we go to page {B/20/7} to start with to
 16 remind ourselves what the introductory words are . So it
 17 has to be, under 2.3(viii), interruption as a result of
 18 notifiable disease occurring within the vicinity of an
 19 insured location . The definition of "Notifiable
 20 Diseases" is at page 29 {B/20/29} . Notifiable
 21 diseases means -- in fact we have in fact three
 22 definitions of "Notifiable Diseases" in (i), (ii) and
 23 (iii) . So it is specified diseases in (i); then any
 24 additional disease notifiable under the regulations ,
 25 with a deeming provision that it was notifiable from its

1 initial outbreak once it has been made notifiable , and
 2 the notifiable disease has to occur within the vicinity
 3 of the insured location .
 4 We say that the causal link , the mandatory causal
 5 link between the occurrence of the notifiable disease
 6 within the vicinity of the premises and the interruption
 7 or interference is established by using the words "as
 8 a result of" within the insuring provision .
 9 You already have my submissions in relation to
 10 proximity requirements in general , and notifiable
 11 diseases in general , so I am not going to repeat them in
 12 the context of the notifiable diseases peril within
 13 RSA4 .
 14 If we then look at the "Other Incidents" definition
 15 within paragraph 69, and that is at (v) {B/20/29}:
 16 "Defective sanitation or any other enforced closure
 17 of an insured location by any government authority or
 18 agency or a competent local authority for health reasons
 19 or concerns."
 20 So that would be an other incident which again has
 21 to occur within the vicinity of the insured premises .
 22 One goes back to the insuring clause .
 23 In short order , first , only closure under legal
 24 compulsion will suffice . The word "enforced" has to be
 25 bringing meaning to a clause , so there has to be

1 a closure which either is or is legally capable of being
2 enforced in order to have enforced closure .

3 Premises which were allowed to continue trading
4 cannot bring themselves within this peril .

5 Premises which were prohibited from trading can
6 bring themselves within the peril , but only from the
7 date on which the relevant closure requirement took
8 effect under the regulations .

9 There has to be a causal link between the enforced
10 closure and the loss , that is made clear from the
11 standard turnover definition . And the health reasons or
12 concerns which are the cause of the closure have to be
13 specific to the vicinity of the premises. That is not
14 to say they can't be wider in geographic scope, but the
15 health reasons or concerns within the vicinity of the
16 premises have to be the cause of the enforced closure .
17 The word "for" should be construed as meaning "because
18 of".

19 MR JUSTICE BUTCHER: Just remind me what categories of
20 insureds have RSA4. It is wholesalers but --

21 MR TURNER: We have manufacturers, we have private health
22 companies. There is a very wide variety , both in terms
23 of categories of business and also size of business .
24 There are obviously hospitality industry insureds ,
25 because there are interveners who come from the

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1 hospitality industry . None of the interveners is
2 actually an RSA insured. But this is a general combined
3 commercial policy which covers a wide variety of
4 different insureds . So hospitality industry ,
5 wholesalers , manufacturers , retailers , it is a very
6 broad spectrum, my Lord.

7 I can then go on to the "Prevention of Access"
8 definition . Again, if we can go back to page 7 just to
9 set the context.

10 My Lord, I can feel Mr Gaisman's breath hot on my
11 neck.

12 {B/20/7}, so interruption or interference to the
13 insured's business as a result of prevention sense of
14 access - non-damage.

15 Then go forward to page 30 for the relevant
16 definition , please {B/20/30}, item 87. I ask you to
17 note the examples given in (i) and (iii), and then (ii)
18 is :

19 "The actions or advice of the police or other law
20 enforcement agency, military authority , governmental
21 authority or agency in the vicinity of the insured
22 locations ..." which prevent or hinder the use of access
23 to insured locations during the period of insurance .

24 My Lord, there is a lower inner limit on this peril
25 than the other two. If one were to look at the sample

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1 schedule, the reference is {B/20/51}, for the notifiable
2 disease and other incidents perils the inner limit on
3 the sample schedule is 2.5 million , for the prevention
4 of access on damage it is 500,000, and obviously there
5 may be variations between different insureds on those
6 figures .

7 We say that this peril is to be construed in a way
8 that actions outside the vicinity of the insured
9 locations and actions which do not prevent or hinder the
10 use of or access to the insured locations are simply not
11 within the scope of the peril insured .

12 Again, tying it back to the definition of "Covered
13 Events" and the use of the word "events", small "e",
14 within that definition , because the actions of the
15 police , et cetera , have to be an event, they have to be
16 actions at a particular time, a particular place . In
17 short , they do have to be specific to the vicinity , even
18 if they could have an effect which goes beyond the
19 vicinity . But for causal purposes one focuses on
20 whether the causing a relationship between the vicinity
21 and the relevant actions is established , rather than
22 looking at something wider ranging .

23 Social distancing measures, we say, do not come into
24 play . Can I give you an example of that . Let's take
25 the example of a small hotel with a booking for a coach

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1 party of 20 people. Just as the coach is about to turn
2 into the hotel it is intercepted by the police , who are
3 waiting for it and its occupants, and the party is
4 arrested and they spend the next 24 hours in custody
5 under investigation .

6 On the FCA's case, the actions of the police , which
7 were undoubtedly in the vicinity of the hotel , have
8 hindered access to the premises and the hotel can
9 recover for the ensuing interference with its business .
10 We say that is a nonsensical result and cannot have been
11 intended . And the reason why the hotel cannot recover
12 for prevention or hindrance of access in those
13 circumstances is because the actions of the police were
14 directed towards the individuals , rather than the
15 premises . They are not within the scope of the peril ;
16 the access to the premises is neither hindered nor
17 prevented.

18 My Lords, the FCA gives a café example in
19 paragraph 588 of its submissions {1/1/204}.
20 Paragraph 588:

21 "Take for example [in line 2] a café located in the
22 suburbs of a city ..."

23 We say that that again repeats the FCA's error of
24 reducing the proximity requirement to a question of
25 ticking a box rather than treating it as an integral

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1 part of the insured peril .
 2 My Lord, the complaint is made by the FCA that we
 3 give no meaning to the part of the clause which reads,
 4 in the "Vicinity" definition , "in which events that
 5 occur in such an area will be reasonably expected to
 6 have an impact".
 7 That complaint was made on {Day3/183:13} to line 25.
 8 I think in fact it was Mr Edey for the hospitality
 9 interveners .
 10 In response to the charge that we are giving no
 11 meaning or content to the definition of "Vicinity" we
 12 say simply this: it means what it says. Its application
 13 is going to be fact- sensitive for any given location .
 14 Hence, we are reluctant to try to produce a one size
 15 fits all definition or meaning. We can give you an
 16 example; an obvious example would be where you have an
 17 insured location on an industrial estate with a single
 18 route of access or egress. Plainly anything which
 19 happens on that single route of access or egress is
 20 likely to have an impact upon the insured premises.
 21 In relation to overlapping cover -- this is the
 22 final point in relation to RSA4, and again this was
 23 raised by the hospitality interveners -- were you to
 24 find that there are overlapping perils in play which are
 25 engaged, then we accept that for the purposes of the

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1 adjustments provisions within the policy those perils
 2 cannot be played off against each other to cancel each
 3 other out.
 4 My Lords, those are my submissions in relation to
 5 RSA4, and those are my submissions unless I can assist
 6 you any further .
 7 LORD JUSTICE FLAUX: No, I don't have any questions. Thank
 8 you very much, Mr Turner.
 9 MR TURNER: Thank you.
 10 LORD JUSTICE FLAUX: Right, is it now Mr Gaisman?
 11 MR GAISMAN: It is, if your Lordships can hear me.
 12 LORD JUSTICE FLAUX: We can hear you, Mr Gaisman. All I was
 13 going to say was, given that it is nearly 10 past 11
 14 would it be sensible to take the break now and then you
 15 will get a clean run at, let 's say, 20 past 11?
 16 MR GAISMAN: I am in your Lordship's hands. I have some
 17 introductory remarks which would take me a little
 18 longer, it would take me to 11.30 or slightly beyond.
 19 I am in your Lordship's hands.
 20 LORD JUSTICE FLAUX: I think it would be sensible if we
 21 broke now and we will say 20 past. My clock says 11.08,
 22 so if we say just before 20 past. All right?
 23 (11.08 am)
 24 (Short break)
 25 (11.20 am)

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1 LORD JUSTICE FLAUX: If you are ready, Mr Gaisman.
 2 MR GAISMAN: Yes, my Lord. Can your Lordships see and hear
 3 me?
 4 LORD JUSTICE FLAUX: Yes.
 5 Submissions by MR GAISMAN
 6 MR GAISMAN: My Lords, in the Hiscox wordings there are two
 7 clauses which have been invoked by insureds , the NDDA
 8 clause and the public authority clause. Typical
 9 examples are in the Hiscox 1 lead wording. We asked for
 10 your Lordships to be supplied with a physical bundle of
 11 Hiscox wordings, which I hope is convenient. The
 12 reproduction on the screen is taxing when the print is
 13 small.
 14 My Lords, if we may start with the public authority
 15 clause and establish the taxonomy. Like the joint
 16 skeleton on causation, paragraph 63, the components of
 17 the public authority clause may be stated in their
 18 correct causal sequence as A an occurrence of a disease ,
 19 a notifiable disease , followed in a causal sense by B,
 20 the restrictions imposed by public authority , causing C,
 21 the insured 's inability to use the insured premises ,
 22 causing D, an interruption which must be the sole and
 23 direct cause of loss .
 24 Your Lordship will know that the page references
 25 are in 42 and 42 in the bundle behind divider 6.

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1 We need to analyse these clauses and the stem from
 2 which they branch without any presumption that they
 3 offer cover in respect of pandemics or that they should.
 4 We need to approach them without hindsight as to the
 5 extraordinary events which we have all experienced this
 6 year. Thus, in deciding whether the parties intended
 7 prospectively , and without knowledge of those
 8 extraordinary events, to apply the usual rules of
 9 insurance law to their contract so that only loss that
 10 would not have occurred but for the insured peril is
 11 recoverable , or whether they must be taken to have
 12 intended to abrogate them or even modify them, we should
 13 not test that with the knowledge of the present
 14 situation , as opposed to the simpler sort of case that
 15 was clearly the paradigm. That is to misuse hindsight .
 16 We also need to be aware that when the FCA invokes
 17 what the parties must have meant, the intention or at
 18 least the effect of that phrase is often to camouflage
 19 those points in its argument where there is nothing but
 20 bare assertion . Testing the operation of clauses on the
 21 basis that it cannot have been intended X or Y because
 22 that wouldn't provide cover in the present situation , is
 23 also to beg the question .
 24 So I intend, in a necessary corrective to the FCA's
 25 submissions, to start as it were in a neutral frame of

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1 mind and focus on the language of the wordings as
 2 reasonably perceived at the date of the contract.
 3 Now, a number of discrete points, some of them in
 4 a sense overlapping, on the two clauses arise.
 5 If Hiscox succeeds in demonstrating that neither
 6 clause applies to the present facts, there will be no
 7 cover. That, obviously, is its primary aim in making
 8 these submissions.
 9 Now suppose, however, that Hiscox falls short of
 10 that aim. It might then be thought that the greater the
 11 number of points on which Hiscox is held to be right and
 12 the narrower the ambit of the insured perils which are
 13 held to operate, the more confined the indemnity is
 14 likely to be. Because the narrower the ambit in my
 15 taxonomy of B, C and D, the smaller the loss that is
 16 likely to flow from their successive effects, which is
 17 what this insurance is against.
 18 Your Lordships will already have appreciated that it
 19 is a remarkable feature of the FCA's submissions on
 20 causation that unless Hiscox has a complete win on
 21 coverage, it may as well not bother making submissions
 22 on many aspects of coverage. Because on the FCA's case,
 23 even if Hiscox is right on many of those submissions, it
 24 won't do it any good. Once A is shown to cause B, C and
 25 D, Hiscox, according to the FCA, is liable for all the

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1 consequences of A, irrespective of how narrow B, C and D
 2 are shown to be, and how little loss is caused by those
 3 factors in combination.
 4 That is a sure sign, one of many, that the FCA's
 5 approach cannot be right. Indeed, it is not right.
 6 First, the FCA seeks to characterise, as your by now
 7 Lordships well know, and I am not going to reinvent the
 8 wheel, seeks to characterise everything that happened as
 9 one indivisible peril; the disease itself, the economic
 10 and social consequences, the whole of the government
 11 reaction and all the losses. But nowhere have the FCA
 12 sought to explain why this extreme abrogation of
 13 separate facts in different categories is an appropriate
 14 standpoint. It is simply a metaphysical assumption, an
 15 unexamined first premise which is never justified. But
 16 it is wrong. I won't go over the effective
 17 demonstration that Mr Kealey conducted on Day 4 of the
 18 way in which the FCA summarises the true cause of
 19 everything in its skeleton and Mr Kealey demonstrated
 20 that that summary bears no recognisable relationship to
 21 any insured peril in any Hiscox wording.
 22 Secondly, we all know that how a court should
 23 properly characterise a set of circumstances depends on
 24 the purpose for which the characterisation is being
 25 made. That is Lord Hoffmann in the Environment Agency

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1 case and your Lordships have it well in mind.
 2 The only legitimate perspective here is to
 3 characterise the facts in light of the ambit of the
 4 perils which the parties agreed were to be insured and
 5 matters which on the true construction of the wordings,
 6 the parties agreed were not insured. The distinction
 7 between these two categories of thing has, we
 8 respectfully submit, to be reflected and carried through
 9 in the court's treatment of the facts and the indemnity,
 10 because otherwise it is rewriting the parties' bargain.
 11 It cannot be right to recast the bargain on the
 12 basis of an assertion, which is all that it is, that
 13 everything is inextricably interlinked. This is because
 14 the contract, read as typically applying to fact
 15 situations where, as I will submit, no undue difficulty
 16 will arise, read against the background of the general
 17 law, read against the contract provisions, including the
 18 trends clauses, requires the court to distinguish
 19 between different things, to recognise that certain
 20 conditions have to be satisfied, so that it is only loss
 21 caused by the effect of and in combination which is
 22 insured.
 23 I shall return to this point if I have time later.
 24 Cases of truly indivisible loss are few and far between,
 25 and the court sets its face against them.

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1 Your Lordships will have picked up the wise words of
 2 Lord Justice Laws in the Area Rose(?) case, which
 3 I shall come back to. Only if there is no rational
 4 basis does the court throw its hands in the air and say:
 5 well, this is a case where people were reading four
 6 newspapers at breakfast and who is to tell which
 7 newspaper, all of which contain the same libel, caused
 8 the damage.
 9 Now --
 10 LORD JUSTICE FLAUX: It is a classic example of the two
 11 people who shoot at somebody at the same time and you
 12 can't say who actually caused the death.
 13 MR GAISMAN: That is -- yes, although that fact pattern,
 14 that example normally arise in a different context but
 15 your Lordship is right.
 16 Can I just develop the point, though. Intrinsic to
 17 the whole of the FCA's approach is the assumption that
 18 any construction or attitude to legal principle other
 19 than its own places an intolerable burden on the assured
 20 in proving its loss.
 21 Well, at the outset I want to put down a challenge
 22 to that entire assumption. Why, in the ordinary case of
 23 the operation of these clauses, which is all that the
 24 parties can be taken prospectively to have contemplated,
 25 why would this be so, typically? A person commits

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1 suicide in a flat above a shop and the building is
 2 closed. Loss is suffered. Why would anyone suppose
 3 that but for the public authority action any customer of
 4 the shop would even have known about it? The obvious
 5 assumption in the counterfactual there is that the loss
 6 would not have been suffered anyway, and so the insured
 7 recovers.

8 When your Lordships go out to dinner in
 9 a restaurant, perhaps instead of a cancelled trip to the
 10 opera, you usually do not know if a previous customer
 11 has sustained food poisoning at it. But supposing that
 12 person conscientiously complains to the authorities and
 13 the restaurant is shut down, the assumption in the
 14 counterfactual again is that the loss would not have
 15 been suffered anyway and there is no obstacle to the
 16 insured making a full recovery.

17 Conversely, in my Lord Mr Justice Butcher's comment
 18 on the lorry spill case, on {Day1/118:1} of the
 19 transcript, it may be that all the loss was caused by
 20 the spill, albeit that the public authority reaction
 21 ensued from it. Or to take a case of a problem with
 22 drains, if a restaurant filled with effluent and later
 23 is closed down, in circumstances where it is obvious
 24 that open or closed no one would have gone to it, why
 25 should the insurer not be entitled to say: the public

1 authority action didn't cause you any loss?
 2 Now, there may be more difficult cases, but then you
 3 get the loss adjusters in. There is not the slightest
 4 evidence in this case, from any loss adjuster, that they
 5 would be defeated in a paradigm case or indeed in this
 6 sort of case, and there is no reason to think that they
 7 would be. The big leap in the FCA's case is to ascribe
 8 to the parties a unique, legally startling and
 9 unequivocal prospective intention to abdicate any
 10 attempt to work out what loss was caused by the insured
 11 peril and what loss would have occurred anyway, on the
 12 basis that they must have assumed in advance that the
 13 problem of quantification of loss would be so difficult,
 14 in a business interruption insurance of all things, that
 15 the normal rules governing the measure of indemnity
 16 should be discarded.

17 There is nothing unusual about difficult questions
 18 of quantification in business interruption insurance, as
 19 the trends clauses expressly contemplate. I do want to
 20 submit that there is simply no basis in the evidence,
 21 there is no basis in the law and there is no basis in
 22 the contract, in other words, there is no basis
 23 anywhere, for this radical assertion.

24 Now if I could inflict a metaphor on your Lordships,
 25 always a dubious exercise, the position is simply this.

1 Imagine that the pandemic is a large bore pipeline
 2 through which liquid flows. The liquid is the loss
 3 which the pandemic causes people, businesses. We will
 4 call that pipeline A. At a certain point in the
 5 pipeline there is a flange at which several smaller bore
 6 pipelines lead off the main pipeline, each of them
 7 taking a small proportion of the liquid flowing through
 8 pipeline A. One of them, one of those smaller
 9 pipelines, is called public authority action, and we
 10 will call it pipeline B. In due course it leads to
 11 pipeline C and to pipeline D but we will leave those out
 12 of the equation for simplicity. Let us assume that
 13 pipeline B receives 25% of the total liquid. Other
 14 pipelines, which we will call X, Y and Z, take the other
 15 75% of the liquid from A.

16 The insurance here is against the loss caused by
 17 public authority action following or caused by -- we
 18 will come back to that -- among other things an
 19 occurrence of disease. It therefore only insures
 20 against the loss coming out of pipeline B.

21 As Mr Kealey explained on {Day4/51} to 53, and 60,
 22 we are not leaving A in the counterfactual and only
 23 reversing B, C and D. A is the reason why there is any
 24 liquid coming through at all. We reverse A to the
 25 extent that A supplied liquid to B:

1 Now, given that Mr Kealey dealt with this all on
 2 Thursday, and I will come back to causation if I have
 3 time at the logical place in my submissions, and I want
 4 to get on to the Hiscox wordings themselves, I just want
 5 to make I think three or perhaps four points by way of
 6 supplement on this.

7 First, of course counterfactuals are relevant to the
 8 general causation question, the "but for" the insured
 9 peril. In addition to the points that my learned friend
 10 Mr Kealey made on Thursday, may I remind your Lordships
 11 that on {Day1/92:1} the FCA's counsel said this:

12 "The court is not being asked to disapply, rule on
 13 or modify the rules of proximate or 'but for' causation
 14 as they apply to the law of obligations. What it is
 15 being asked to do is to rule on their application within
 16 the confines of specific BI insurance policies."

17 That statement appears to us to acknowledge that the
 18 "but for" test has to be applied and satisfied. We are
 19 not all wrong about this. In the Hiscox case, as
 20 your Lordship will see from page 44 of the bundle which
 21 your Lordships have open, the loss of income clause
 22 expressly, as it were, leaves the counterfactual
 23 hanging, but inevitably so. So on page 44, a third of
 24 the way down, loss of income, the amount we will pay to
 25 for each item, "The difference between your actual

1 income during the indemnity period and the income it is
 2 estimated you would have earned during that period ..."
 3 And the court has to supply the ...
 4 My Lord, can I make a second point which is to do
 5 with reversing out the counterfactuals. This is an
 6 additional point to Mr Kealey's. The debate as
 7 presented by the FCA is between extreme alternatives.
 8 The FCA says that one is one must reverse out the
 9 disease altogether, and the FCA accuses the insurers of
 10 failing to reverse it at all. But as I have said, it is
 11 not -- I only speak for Hiscox, unlike Mr Kealey on
 12 Thursday -- it doesn't matter how often this is said by
 13 the FCA, it is still not true. It is not Hiscox's case
 14 that we are failing to reverse out the disease. We are
 15 not cherry-picking. We are not ignoring the dominoes,
 16 to use my learned friend Ms Mulcahy's metaphor, because
 17 she made the same charge as Mr Edelman did and it is no
 18 better founded. Indeed, and I know there was a lot to
 19 read, but we did make this all pretty clear in our
 20 skeleton that we are reversing out the disease, but only
 21 insofar as the disease causes the public authority
 22 action, et cetera.
 23 You will find that in paragraph 365 of our skeleton,
 24 and it has not been answered, it has just been ignored
 25 so far. All of this is orthodox causation reasoning,

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1 reversing the insured peril, properly described, and its
 2 consequences. There is no magical difference between BI
 3 covers with complex triggers and any other insurance.
 4 The third point I want to make is this: your
 5 Lordships are well aware, this is as to the extent to
 6 which it is the FCA that is tearing up the rule book on
 7 causation, that it extends its case to saying that the
 8 indemnity should extend to covering a loss of turnover
 9 even before the insured peril has operated, the
 10 approaching hurricane and so forth.
 11 Your Lordships expressed a little scepticism about
 12 this. My point is that this isn't really a severable
 13 the part of my learned friend's analysis. As usual,
 14 it is justified on the basis of the parties' intentions,
 15 which begs the question, and because, so the FCA says,
 16 it is ridiculous to sever the approaching hurricane from
 17 the actual hurricane, it is all inextricably
 18 interlinked.
 19 My Lords, this chain of unsupported assertions is
 20 not just wrong, it is the 13th chime on the FCA's whole
 21 causation edifice. Why should insurers pay for more
 22 than the loss caused by A that comes out of the end of
 23 pipeline B.? That is what they have agreed to pay. And
 24 although the FCA denies, in the passage that I read to
 25 your Lordships from my learned friend Mr Edelman's

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1 submissions on Day 1, although it apparently denies that
 2 it is disapplying or even modifying the rules, your
 3 Lordships are actually being invited to voyage to a very
 4 strange place indeed.
 5 Now, my Lords, I hesitate to make the next point,
 6 it is so obvious. English judges decide the cases
 7 before them on the basis of principle, and that makes
 8 our law predictable, coherent and certain; it consists
 9 of an objective and principled set of rules. Those
 10 advantages, on which your Lordships do not need a homily
 11 from me, become clearer still on the rare occasions when
 12 the judges, no doubt for good and sufficient reason in
 13 one sense, abandon those rules.
 14 Now, my learned friend Mr Edelman does not dwell on
 15 the Fairchild Enclave and we are not surprised. But the
 16 truth is it is a cautionary tail, that decision and its
 17 progeny, and I just ask your Lordships to bear in mind
 18 something that Lord Sumption said in IEG v Zurich, at
 19 paragraph 114, I don't think we need to look it up,
 20 where he talked about how, as a result of the original
 21 Fairchild decision, the law had moved from each one of
 22 expedient to the next, generating knock-on consequences
 23 which we are not in the position to predict or take into
 24 account.
 25 I do submit, my Lord, if I am permitted to do so,

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1 that the abandonment of principle by one court can
 2 create untold problems for future courts, and that in
 3 our commercial law above all is a course to be avoided.
 4 LORD JUSTICE FLAUX: That was demonstrated in the context of
 5 the Fairchild Enclave by the dispute which I had to
 6 arbitrate in MMI v Equitas, which as I understand it is
 7 Not going to the Supreme Court because it settled, but
 8 was due to go to the Supreme Court, no doubt where they
 9 might have had something to say about the Fairchild
 10 Enclave and the mess it has got us into.
 11 MR GAISMAN: Lord Justice Males had already said something
 12 about it, my Lord.
 13 LORD JUSTICE FLAUX: Yes, he certainly did.
 14 MR GAISMAN: Effectively it was, "Come on chaps, the party
 15 is over", if I can put it this way without disrespect.
 16 I have said enough on this. Can I come back to the
 17 two Hiscox clauses. To save time I am going to deal
 18 with certain points which are common to both first,
 19 your Lordships have them well in mind, and your
 20 Lordships have I hope has read our skeleton and seen how
 21 the points go logically under each clause.
 22 Now can I first say something about the FCA's
 23 approach. We complained in our skeleton, and this is
 24 not really my point but I do make the complaint, about
 25 the atomistic approach to the isolation of certain words

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1 and the failure to construe them in context. I don't
 2 need to say any more about that. But there is something
 3 authority problematical in that, and I recognise the
 4 burden that the FCA is under in this case but the
 5 process of taking words from individual insurers'
 6 policies, grouping them together, submitting that they
 7 must all mean the same thing, it's very difficult. And
 8 your Lordships have got dozens of wordings, it is very
 9 difficult to keep one's eye on the ball. And I don't
 10 want to be solipsistic by saying it is Hiscox wordings
 11 and nobody else's that for the moment I am inviting your
 12 Lordships to look at.

13 LORD JUSTICE FLAUX: That was precisely the reason why at
 14 the second case management conference we refused
 15 Mr Turner's application to adduce evidence of yet more
 16 wordings which weren't before the court, because we are
 17 not assisted by, as it were, cross-fertilisation of
 18 wordings. That is not an appropriate way of construing
 19 contracts at all.

20 MR GAISMAN: No, but my point is -- I respectfully adopt
 21 what your Lordship says. My point at the moment is
 22 a slightly different one, which is that this omnium
 23 gatherum approach has a particular defect so far as
 24 Hiscox is concerned. It tends to draw attention away
 25 from the very specific nature of the events which have

1 to be present as what you might call initial triggers,
 2 or initial elements of the trigger, under are both of
 3 these clauses and, in some sense at least, to cause the
 4 ensuing action. Those are the first two elements under
 5 both clauses that the FCA needs to establish.

6 Now, just for example, when we look -- and I am not
 7 asking your Lordships yet to turn it up -- at the
 8 particulars of claim paragraph 43, rather to our
 9 surprise we see that the same facts are pleaded as both
 10 an incident, which is a rather small sounding word, and
 11 an emergency, which is a rather large sounding word.

12 Now, my clients' policies don't insure against
 13 emergencies. I would like, as I say, to focus on --
 14 this where is I am going next -- the qualifying
 15 conditions for cover and the true cause of the
 16 government action in March.

17 To trigger one or other of the Hiscox clauses the
 18 FCA must show, I hope your Lordships have pages 41 and
 19 42 open which will do, they must show an incident or an
 20 occurrence of a notifiable disease, to paraphrase. If
 21 the FCA cannot show that, the claims against Hiscox will
 22 fail at the outset.

23 Furthermore, it is inevitably common ground that
 24 as regards the NDDA clause the incident must be a local
 25 one, within a 1 mile radius, or occasionally the

1 vicinity. The Hiscox 4 wordings also have an express 1
 2 mile radius in the public authority occurrence clause.

3 Moreover, and as is common ground and admitted,
 4 there has to be a causal relationship between the
 5 incidence and the occurrence and the subsequent public
 6 authority actions.

7 Now, what sort of a thing in principle is an
 8 incident or an occurrence? As my Lord
 9 Lord Justice Flaux rightly stressed at the outset of the
 10 FCA's submissions on this clause, an occurrence, not
 11 lots of occurrences but an occurrence, {Day2/130:2} to
 12 5, and indeed also an incident.

13 In a case too well-known to require citation but
 14 I seem to be citing it, Lord Mustill in AXA v Field, in
 15 relation to an event, said that it was something that
 16 happens at a particular time, at a particular place, in
 17 a particular way. And the same is true of an incident
 18 or an occurrence. The FCA's skeleton at footnote 329 on
 19 page 133 equates the three terms. That is also the
 20 ordinary way in which we use these words.

21 Now, the fact that AXA was a reinsurance case and
 22 the issue there was one of aggregation is neither here
 23 nor there. Lord Mustill's dictum has been applied more
 24 widely in the insurance context, for example in
 25 Zurich Insurance v Maccaferri {J/136/1} where the notice

1 clause in a product liability policy required that the
 2 insured give notice in writing as soon as possible after
 3 the occurrence of any event likely to give rise to
 4 a claim.

5 It was common ground between counsel that
 6 Lord Mustill's definition of "event" was apt, and
 7 counsel included my learned friend Mr Edelman.

8 Now the words "incident" and "occurrence", an
 9 incident, an occurrence, could not be more different
 10 from abstract, potentially widespread words like
 11 "danger" or "emergency".

12 These words, "incident" and "occurrence", are
 13 particular, concrete, confined. Read without hindsight,
 14 nobody could seriously argue or would seriously argue
 15 that they applied to a national or an international
 16 state of affairs.

17 Now, the FCA's case is that whatever it was that
 18 triggered these clauses was an incident or an
 19 occurrence. "Occurrence" is pleaded in paragraph 38 of
 20 the particulars of claim, and "incident" is pleaded in
 21 paragraph 43 of the particulars of claim.

22 The funny thing is that the FCA's primary case on
 23 the meaning of these words, and how they are proved, is
 24 put in two completely different ways, which is odd,
 25 because since they are similar words you would think

1 that the FCA would address them in similar ways. But
2 the FCA cannot make up its mind.

3 As regards the public authority clause, which
4 requires an occurrence, the FCA adopts a granular
5 approach. It says that an occurrence happened -- this
6 is paragraph 38 -- as soon as COVID became a notifiable
7 disease, and that was on 5 March, which was also the
8 date upon which the first COVID death was reported, as
9 paragraph 18.7 of the particulars of claim reminds us.
10 In other words, it doesn't matter if there was only one
11 case or how many cases there were or, in a sense, how
12 few there were, the individual cases of the disease were
13 the occurrence, once it was notifiable as required by
14 the public authority clause.

15 When it comes to "incident", an incident, which is
16 what is required by the NDDA clause, however, the FCA
17 turns the telescope round and looks through the opposite
18 end. Instead of focusing on the individual case, the
19 FCA adopts the most soaring of birds' eye views. The
20 "incident", which one might have thought was a rather
21 specific sort of word, is the nationwide emergency; that
22 is paragraph 43.

23 Now, this ambivalence reflects the FCA's perennial
24 problem, which is this: the individual local incident or
25 granular occurrence was not the cause of the government

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1 measures in any sense. And the true cause of the
2 government measures, the pandemic emergency, is not an
3 incident or an occurrence within either of the clauses.
4 That, we say, is the bind which the FCA is in.

5 What do I mean by saying that it was the pandemic
6 emergency which caused the government measures? Indeed,
7 what was it that caused the government measures? The
8 answer given by the FCA, and perhaps we can look at
9 {A/2/28}, is in the particulars of claim, paragraph 43.
10 It is the first sentence:

11 "The pandemic was a nationwide emergency arising out
12 of a highly contagious disease ..."

13 Now that statement rightly recognises two things:
14 first, it treats the pandemic as an emergency; and
15 secondly, it contrasts both the pandemic and the
16 emergency with the disease out of which the pandemic
17 emergency is said to have arisen.

18 The pandemic emergency, my Lords, is not the case of
19 the disease in Alnwick which the FCA says will trigger
20 the cover of a businessman in Ilfracombe.

21 Let's assume they are right on that for the moment.
22 A pandemic, the pandemic is not even the aggregation of
23 the total number of cases on any date you care to choose
24 in March. If the government had thought that was all
25 there were ever going to be, it is most unlikely it

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1 would have done anything. No, the pandemic emergency
2 and the true cause of the government measures was much
3 more than that. Crucially, it was the future. It was
4 the government's and the scientists' fear of what was to
5 come. It was all the future projected cases of the
6 pandemic. Importantly, and as my learned friends
7 reminded your Lordships on Day 1, it was the real
8 concern that the NHS would be overwhelmed unless the
9 measures were taken. That was mentioned several times
10 on Day 1.

11 My learned friend Mr Edelman also mentioned,
12 obviously an associated point, the fear of what he
13 called much higher mortality if preventive measures
14 weren't taken, {Day1/141:1} to page 142. Sources in the
15 materials which are before your Lordships mention the
16 figure of 500,000 deaths if preventative measures
17 weren't taken, but I am sure your Lordships remember
18 that anyway. In the Prime Minister's words, which we
19 don't need to look at, it is {C/2/371}, he said in May:

20 "It is a fact that by adopting those measures we
21 have prevented this country from being engulfed in what
22 could have been a catastrophe in which the reasonable
23 worst case scenario was half a million fatalities."

24 There is also in the bundle an article in The
25 Lancet, in the agreed facts, which refers to disease

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1 modellers whose initial forecast was that in the absence
2 of suppressive measures COVID could have resulted in the
3 deaths of 500,000 people in the UK, and that this had
4 been widely credited with persuading the UK Government
5 to reverse course and institute a strict lockdown.

6 Again, my learned friend Mr Edelman on {Day1/130:1}
7 talked about government action having been driven in
8 part by what he called apprehension.

9 It is all the same point. The government's reaction
10 was not a response to any particular incident or
11 occurrence, whether within a 1 mile radius or at all,
12 but to a general fear of what might come, which operated
13 on a vastly wider scale. Only that, only that could
14 possibly have led the government to introduce what, one
15 needs to remember, was an unprecedented abrogation of
16 personal freedom.

17 Now, in the light of that one comes back to the two
18 Hiscox clauses, which if your Lordships still have, I am
19 sure your Lordships know them very well. Let me pose
20 the question the other way round. Can the pandemic or
21 the emergency, as I have explained its true nature,
22 really be said to have been an incident within a 1 mile
23 radius, an occurrence of the disease? Let it be assumed
24 for the moment an occurrence of the disease anywhere.
25 Surely the pandemic emergency was the antithesis of

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1 something that happens at a particular time, at
 2 a particular place, in a particular way, which is
 3 Lord Mustill again.
 4 Whatever it was --
 5 MR JUSTICE BUTCHER: I certainly see in relation to an
 6 incident within a 1 mile radius, Mr Gaisman, you say
 7 that the words speak for themselves. But in relation to
 8 the occurrence of the disease, surely action by the
 9 public authority is always there, in a sense, concerned
 10 with the future, with the possibility of the disease
 11 spreading.
 12 MR GAISMAN: My Lord, of course I understand that point, and
 13 if I may say so I do dispute it.
 14 In the case where Legionnaires' disease is found in
 15 a shower, your Lordship is quite right that there is, in
 16 a sense, at the back of the public authority's mind ...
 17 LORD JUSTICE FLAUX: We have lost you again.
 18 MR GAISMAN: Can you hear me now?
 19 LORD JUSTICE FLAUX: Yes.
 20 MR GAISMAN: Of course I accept in principle my Lord
 21 Mr Justice Butcher's point, but in the case of the
 22 Legionnaires' disease, there is simply -- there is the
 23 shortest possible causal chain. The local authority
 24 receives a report, bang, it closes down. I don't
 25 dispute that, as it were, at the back of the local

1 authority's mind there is: well, what happens if we
 2 don't? And this is a fact-sensitive question to an
 3 extent. But what I am seeking to do is not to dispute
 4 the point that has been put to me but to seek to argue
 5 that on the facts of the present case the occurrence is
 6 not causal in any sense. Indeed, it is what in
 7 a Freudian slip the FCA calls part of the factual
 8 background; that is paragraph 60 of the particulars of
 9 claim.
 10 So I take my Lord's point, but what I am inviting
 11 your Lordships to do is to look at what happened in this
 12 case and ask whether it can truly be said, on the facts
 13 of the present case, that the public authority's
 14 reaction -- sorry, I have got two thoughts in my mind at
 15 once. But a reasonable observer would say: well, if you
 16 have got a case of Legionnaires' disease in the showers,
 17 you are going to be closed down, mate. It is just
 18 falling off a log; it is an obvious consequence.
 19 What happened here, my Lord, was no doubt, if one
 20 thinks of other pandemics for example, or other
 21 countries, what happened here was utterly extraordinary,
 22 and the causal chain between the occurrence and the
 23 subsequent government measures incorporated so many
 24 extraneous elements which are far beyond and outside the
 25 purview of the occurrence that we are simply in

1 different territory.
 2 So that would be my answer. I am going to come back
 3 to this when I deal specifically with the public
 4 authority clause. But my overall point is that whatever
 5 it was that did cause the government measures, it was
 6 not an incident or an occurrence.
 7 The FCA is trying to cram something which is far too
 8 big, far too amorphous, far too prospective and so much
 9 more than even the total sum of the cases of the disease
 10 at present, or give a date in March, into two clauses,
 11 both of which, not just one but both of which, and it is
 12 unsurprising that they go together, contemplate events
 13 on a wholly different scale and of a wholly different
 14 nature.
 15 Of course I haven't forgotten that the FCA is not
 16 saying that the pandemic was the occurrence; that is
 17 paragraph 38 of the particulars of claim. But if it
 18 commits itself to a granular definition of "occurrence",
 19 which it does, it cannot credibly assert that the
 20 individual occurrence or few occurrences of the disease
 21 in any sense caused the government measures. And it is
 22 in that sense, that is why we respectfully submit Hiscox
 23 is right to say that its BI covers do not insure
 24 pandemics. It is impossible to say that the cause of
 25 the government measures, which was the pandemic

1 emergency, was an incident or an occurrence in the AXA v
 2 Field or in any normal sense.
 3 If I am right or anything like that point, perhaps
 4 with the modification, if it is a modification,
 5 introduced by my Lord Mr Justice Butcher's question, the
 6 FCA's bind, as I call it, on these clauses is
 7 inescapable, and it means that the claims against Hiscox
 8 should fail.
 9 That is that point. Can I now move on to two
 10 smaller points on the clauses taken together.
 11 The first is this, it is a short point: these
 12 clauses and this BI cover is invariably an adjunct to
 13 property cover, as we explain in our skeleton. In fact,
 14 as my learned friend Mr Kealey explained on Day 4, it is
 15 an adjunct to an adjunct, the non-damage extension to
 16 the BI extension to the property cover. Now the fact
 17 that the cover is an adjunct to property cover, I don't
 18 say it is decisive but it supports the conclusion that
 19 the two relevant clauses are objectively intended to
 20 address risks local and specific to the insured, its
 21 business or its premises, rather than universal risks.
 22 This point is reinforced by the subject matter of
 23 the other restrictions within the public authority
 24 clause, but I am making a simpler point, that with
 25 property insurance the objective aim is, normally, to

1 cover misfortunes that happen specifically to the
 2 insured. Of course it may be in company with others,
 3 but not misfortunes whose character is to affect the
 4 whole nation indefinitely.

5 The FCA skeleton deals with its point,
 6 paragraph 355, by saying that the government
 7 restrictions are in fact "specific to every insured".
 8 That is a misuse of language. Restrictions which apply
 9 indifferently to all cannot be described as specific.

10 My next short point is about the loss of attraction
 11 cover. Now, in relation to both clauses the FCA, if
 12 your Lordship wants a page reference it is on page 41 of
 13 tab 6 of the lead type 1 policy.

14 Now, in relation to both clauses the FCA argues that
 15 they cover diminution in custom. Its frequent assertion
 16 is that a business whose customers who cannot use it
 17 normally has suffered an inability to use or a denial or
 18 hindrance of access; for example, its skeleton
 19 paragraph 365 and 725. We will submit that those
 20 arguments are wrong on their own terms and we will deal
 21 with them.

22 It is, however, worth pointing out that in some of
 23 the Hiscox wordings, I think 13 out of 40, and many of
 24 those which include the NDDA cover, eight out of 14,
 25 there is separate provision for loss of attraction,

1 ie loss of customer footfall. So why are insureds who
 2 have the benefit of loss of attraction cover from Hiscox
 3 not invoking it? The answer is because it depends on
 4 physical damage, so it is not available. For that
 5 reason, the insureds have to try and shoehorn -- an
 6 overused word in this case, I apologise -- this head of
 7 loss into another cover, and to argue that loss of
 8 customer footfall is to be re-presented as an inability
 9 to use or a hindrance of access.

10 I want to make two supplementary points about that.
 11 The first is, although it is out of order, I would like
 12 to pick up my Lord Mr Justice Butcher's point on
 13 {Day 2/159:1} when my learned friend Mr Edelman was
 14 making submissions about the meaning of "interruption".

15 As I have just said, this clause, the loss of
 16 attraction clause, is in fewer than one third of our
 17 wordings, but it is in 13 out of 40. And the point that
 18 was put, it was my Lord's point, not the FCA's, was that
 19 the meaning of "interruption" must take its colour from
 20 the loss of attraction cover, which refers only to
 21 a shortfall.

22 My Lord, the first point about that is that that
 23 observation, if I may say so, proves too much. This
 24 extension of cover has nothing to do with interruption
 25 in any possible sense of the word, and I will come back

1 at a later stage of my submissions to show
 2 your Lordships that there is no case we have been able
 3 to find anywhere which construes interruption, and of
 4 course it depends on the policy, to mean anything other
 5 than a cessation. I will come back to that.

6 But a shortfall is not interruption in any sense.
 7 We explain this clause and we deal with what we
 8 anticipated would be the point, although it is slightly
 9 depressing that it came from my Lord and not from the
 10 FCA, in paragraph 285 of our skeleton argument. I am
 11 not going to -- it may be, who knows. I am not going to
 12 go to that now, my Lord. Can I ask your Lordships to
 13 read it and in due course to accept it. When I come
 14 back to interruption, I will say that the tail of loss
 15 of attraction can't possibly wag the dog of
 16 interruption, and there is an obvious explanation as to
 17 why the clause is there, and in fact it should have been
 18 below the line, which we will see on page 43 halfway
 19 down the page. It belongs with employees' lottery win
 20 and cancellation abandonment. I am just giving your
 21 Lordships a reference there to paragraph 285.

22 But can I make one other point, and this is
 23 a cautionary note, not a criticism of anybody.

24 The FCA spent most of its time looking at the
 25 Hiscox 1 wording, which is on pages 41 and 42. I sense

1 your Lordships have too. It is very tempting to do that
 2 because it is the fullest wording. However, it should
 3 be borne in mind, and your Lordships have annex 2 to our
 4 opening, that many of the Hiscox wordings have far more
 5 limited cover and many of these points simply don't
 6 arise at all.

7 Just let me give your Lordship one example. If you
 8 look at -- as I say, this is all in our skeleton at an
 9 annex 2, but if you go to {B/7/25}, here we have the
 10 lead Hiscox 2 wording, and there is far narrower cover
 11 and far fewer special covers. All that is covered is,
 12 so far as relevant to our case: public authority, which
 13 is between the two hole-punches -- sorry, that is not
 14 very helpful if your Lordship is looking at the screen;
 15 denial of access, but only where damage; financial loss;
 16 suppliers but not customers, and I will come back to
 17 my Lord Lord Justice Flaux's point on specified
 18 customers later in my submission, but it is not a point
 19 available on this wording because it isn't there; and
 20 public utilities.

21 The temptation of elegance, surely the most tempting
 22 temptation of all, is to give these words the same
 23 meaning across the board, but it is very important that
 24 your Lordships, unappetising as the task is, recognise
 25 that in many cases the Hiscox type 1 policy simply

1 doesn't apply, and it would be misleading your Lordships
 2 for anyone to suggest that it does, not that I am
 3 suggesting that anyone has.
 4 LORD JUSTICE FLAUX: This is the hairdressers' policy, is
 5 it?
 6 MR GAISMAN: It is salons, my Lord. Whether one gets
 7 anything in a salon other than one's haircut I shudder
 8 to think.
 9 My Lords, can I then come on to a slightly more
 10 important topic in a sense, which is the essence of the
 11 insured peril under the clauses. What are these two
 12 clauses insuring against? What is the insured peril?
 13 Usually that is not a difficult question to answer. But
 14 in the case of business interruption insurance where
 15 there are composite elements, it is often the case that
 16 one has to analyse multiple elements to get to the core
 17 of the peril. This characterisation is particularly
 18 relevant to causation.
 19 Before the opposite is said, or even written down,
 20 by my learned friends, this does not mean that I am
 21 denying or ignoring any of the elements, the composite
 22 elements of the insured peril, nor am I cherry-picking
 23 or ignoring what has to be reversed out in the
 24 counterfactual. But it goes to this question, my Lords,
 25 whether the parties can really have intended there to be

1 an indemnity for all the consequences of disease, once
 2 public authority action occurs, et cetera, as opposed to
 3 the narrower effects of the disease in combination with
 4 the other elements of the clause.
 5 My Lords, the core of the peril yields the answer to
 6 the scope of the indemnity. The identification of the
 7 core of the peril yields the answer to the scope of the
 8 indemnity.
 9 The fact that the separate elements in the clauses
 10 have to be causally related makes it clear that this is
 11 not a discrete insurance for each of them separately.
 12 So one has to ask the question: what is the essence of
 13 the insured peril? And I ask that question quite
 14 unapologetically, having dealt with the only specious
 15 accusation as to why this shouldn't be being done.
 16 But I am fortified, my Lords, by the fact that the
 17 FCA actually agrees that one has to ask the question:
 18 what is the core of the insured peril? If your
 19 Lordships look at our skeleton argument at
 20 paragraph 352. If we have it on the screen, it is
 21 {1/13/112}. Picking it up five or six lines from the
 22 bottom -- well, picking it up at line 5, what is
 23 fundamental, we say, is that the cover is not for
 24 murder, disease, et cetera, provided only that there is
 25 something extra in the form of public authority action.

1 Cf, the FCA's position is "The cover is for the effects
 2 of murder or suicide, but only where there is public
 3 authority intervention -- that is the 'something
 4 extra'."
 5 Then we say this is to turn the clause on its head.
 6 The cover is for public authority restrictions, provided
 7 they have been imposed following murder, bad drains,
 8 disease. It is not for murder, bad drains, disease --
 9 provided only that there is consequent public authority
 10 action.
 11 In a back-handed compliment, the FCA says that is
 12 really the heart of the matter. So that exchange, that
 13 statement and what the rival cases are demonstrates that
 14 there is agreement about the methodology; you have to
 15 look for what the core or the essence of the insured
 16 peril is. It is just that we disagree about what the
 17 core or the essence in fact is.
 18 The FCA's case is clear from those passages, and if
 19 we could just remind ourselves what its counsel said on
 20 Day 1: insurers are insuring against the effects of
 21 contagious diseases and that includes not just the
 22 reaction of the authorities but also the reaction of the
 23 public. That was {Day1/98:1}. So if the public would
 24 have refused to eat in a restaurant awash with effluent,
 25 that is covered too as long as the authorities react.

1 On page 99, the subject matter of the clause is
 2 notifiable diseases. The subject matter of the clause
 3 is notifiable diseases.
 4 Page 100, disease is the true nature of the insured
 5 peril.
 6 Page 121, my learned friend had moved on to rats,
 7 but rats, he said, is what the cover is all about.
 8 Those propositions are all unjustified as a matter
 9 of construction. Hiscox's case is that under these
 10 clauses it is essentially insuring the consequences of
 11 restrictions or denial, hindrance of access, imposed by
 12 the competent authorities, it is not insuring all the
 13 losses caused by the underlying reason for the
 14 restrictions.
 15 That is clear from, in this case, unlike in RSA's
 16 case, the headings, which are an admissible aid to
 17 construction, there being no provision that says that
 18 one can't have regard to them. Neither of them refers
 19 to any underlying cause, but they refer either to the
 20 restriction or to the authority imposing it. It is
 21 clear from other clauses in the wordings, which refer to
 22 restrictions as the peril. My learned friend says that
 23 is a signpost. It is not a signpost, it is a summary of
 24 what the core of the peril is.
 25 The other clauses that we have in mind are

1 identified in paragraphs 150 and 151 of our skeleton
2 argument, where we also make specific and careful
3 submissions about the structure of the public authority
4 clause, and how the concept of restrictions imposed sits
5 at the heart of the clause as a matter of meaning and
6 syntax.

7 My Lords, in the NDDA clause, the reason for
8 referring to the incident at all is because the
9 draftsman wishes to make clear that it is not all
10 denials of access by the authorities that will trigger
11 cover, but only those which are caused by an incident
12 within a 1 mile radius. The word "incident" is the hook
13 whereby a 1 mile radius, or the vicinity, is attached to
14 the clause.

15 Likewise, in a public authority clause, the presence
16 of subclauses (a) to (e) is because the draftsman wishes
17 to make clear that it is not all restrictions imposed by
18 the authorities which will trigger cover, but only those
19 imposed for the reasons identified in those clauses.

20 If those were not present, obviously there could be
21 no doubt that the insured peril would be the denial of
22 access or the public authority restrictions imposed.
23 But what is clear, and your Lordship has heard this
24 submission previously, but what is clear is that the
25 local nature of the incident and the underlying causes

1 (a) to (e) are there to limit and qualify the public
2 authority action which is within the cover. In other
3 words, they cut down the breadth of the insured peril by
4 making it clear that it only responds to a sub-set of
5 possible causes of denial of access, hindrance of
6 access, restrictions imposed. It is therefore, in
7 principle, obvious that these limitations would be
8 unlikely to have the effect of expanding the insured
9 peril or expanding the indemnity. Nor does it change
10 their character.

11 But one of the striking features, as we have seen
12 from paragraph 352 of our skeleton, about the FCA's case
13 on causation (1/13/112) is the way in which cover for X,
14 but only on condition that Y happens, is transformed in
15 the cover for Y but only on condition that X happens.
16 Here we see why they are wrong. Since the local
17 incident and the occurrence of disease are not insured
18 perils in their own right, but rather their function is
19 only to qualify and define the type of action which
20 triggers the cover, and therefore are not also perils in
21 their own right but only subsidiary elements in
22 a composite peril, it cannot in principle be correct to
23 require the insurer to indemnify the insured as if they
24 were independent insured perils.

25 One of the curious facts about this case is that if

1 one conducts the experiment of two insurers, one
2 insuring pandemics in the broadest and most explicit
3 possible terms, and the other, an insurer like Hiscox,
4 writing cover on the basis of these two clauses, the
5 astonishing thing about the FCA's case is that they are
6 both going to end up paying the same indemnity. That is
7 not logically impossible but it would give one pause for
8 thought.

9 Curiously, my Lords, there are times, and this is
10 really no more than a tease, when the FCA inadvertently
11 agrees with us about this. For example, in
12 paragraph 354 of its skeleton, {1/1/135} it says:

13 "The burden of the clause [and it is talking about
14 our clause, the public authority clause] is authority
15 action affecting the premises, not a disease occurring
16 within a specified distance."

17 Of course they are dealing with a point about
18 distance, which is the 1 mile radius point is absent
19 from Hiscox 1 to 3, but I quite like "The burden of the
20 clause is authority action affecting the premises".
21 Although it is a Freudian slip, perhaps it is
22 a recurrent one because, as I told your Lordship
23 a minute ago, the irresistible rise of the disease to
24 the status of the insured peril itself, as in
25 paragraph 421 of the skeleton of the FCA, it has been

1 a remarkable rise from humble beginnings my Lords,
2 because, as I told your Lordships earlier, in
3 paragraph 60 of the particulars of claim the FCA was
4 referring to vermin, disease and so on, ie the reasons
5 in subclauses (a) to (e), as merely "part of the factual
6 background". We agree.

7 What a contrast there is between that case, as
8 formulated in the particulars of claim, and what is now
9 said about vermin in the FCA's skeleton, as I say, in
10 paragraphs 421 and 422, where the vermin have been
11 promoted to the insured peril, and the requirement for
12 public authority action is explained as being there
13 first to ensure that only claims are made where the rats
14 are really big rats and, secondly, to enable the insured
15 to prove that they are. My Lords, though that is
16 a slightly mischievous paraphrase, I have not failed
17 accurately to -- as your Lordships can see if your
18 Lordship read it for yourselves, that is the
19 justification for the public authority action put
20 forward in paragraphs 421 and 422 of the FCA's skeleton.

21 What does this come down to? We say this is going
22 to look difficult on the page because the transcript
23 won't emphasise the words I want to be emphasised, but
24 the insured peril under these clauses can be expressed
25 in this way so as to reflect where the centre of gravity

1 of the clause is .
 2 If we take the NDDA clause, it is an interruption
 3 caused by imposition by the relevant authority of
 4 a denial or hindrance in access, so long as it results
 5 from an incident within a 1 mile radius or the vicinity .
 6 Then can we capitalise these words in the transcript :
 7 AND NOT AN INCIDENT WITHIN A 1 MILE RADIUS OR THE
 8 VICINITY SO LONG AS IT CAUSES IMPOSITION OR THE DENIAL
 9 OF OR HINDRANCE IN ACCESS .
 10 Likewise , under the public authority clause , what it
 11 insures against is an interruption caused by
 12 restrictions imposed by a public authority causing the
 13 insured's inability to use, so long as though
 14 restrictions follow and are in some sense caused by one
 15 of the five reasons set out in (a) to (e) . Then in
 16 capital the two words AND NOT each of the five reasons
 17 in (a) to (e) so long as these are followed by, and in
 18 some sense cause, restrictions imposed by a public
 19 authority causing the insured's inability to use.
 20 That question of construction is obviously at the
 21 heart of the dispute between my learned friends and my
 22 myself, between the FCA and my clients, and I leave that
 23 there with your Lordships for now.
 24 I want to move to a different topic , which is
 25 restrictions imposed, or imposed. The words

1 " restrictions imposed" are in the public authority
 2 clause . The word in the NDDA clause is just "imposed",
 3 denial of access or a hindrance of access imposed by
 4 various local authorities . I want to deal with both.
 5 These words, we submit, both individually and in
 6 context, clearly denote that which is mandatory and only
 7 that which is mandatory. The phrase or the word cannot
 8 be applied to guidance, advice or instructions which may
 9 be ignored by the recipient without infraction or legal
 10 sanction . It naturally suggests, and indeed the FCA
 11 agrees that it suggests, something compulsory.
 12 The only things in this country which are compulsory
 13 for the population at large are those which have the
 14 force of law . A number of sub-points flow from that
 15 basic submission .
 16 First, this is the natural and dictionary meaning of
 17 the word "imposed"; see our skeleton at paragraph 193.
 18 Secondly, the fact that the imposer is stated to be
 19 a public authority or similar body is a clue, because
 20 these are bodies that have legal powers to impose, well ,
 21 most obviously closure of a restaurant where there are
 22 rats in the kitchen, but in all other cases too.
 23 Thirdly, the references to denial of access and
 24 inability to use are to the same effect . In a free
 25 country, somebody can access insured premises and use

1 them, and if that person is denied access or unable to
 2 use them, his own premises, because of restrictions
 3 imposed by a public authority , that can only be by
 4 operation of law .
 5 Fourthly, my Lord, the March regulations were made
 6 by the Secretary of State pursuant to the 1984 Public
 7 Health Act, section 45C(3)(c), which empowered him to
 8 make regulations "imposing or enabling the imposition of
 9 restrictions ..."
 10 We don't need have it on the screen but for the
 11 transcript it is {J/5.1/16}. This language was
 12 reflected in the preamble to the March regulations
 13 themselves. Let's get those up {J/16/1}, please. Where
 14 two-thirds of the way down the page, in the third
 15 paragraph of the preamble, it is recited that:
 16 "The Secretary of State considers that the
 17 restrictions and requirements imposed by these
 18 regulations are proportionate ..."
 19 Something that he has to certify under the statute .
 20 So this is all or should all be plain sailing .
 21 Fifthly , my Lords, we demonstrate in detail in
 22 paragraph 199 of our skeleton, {1/13/63} that all the
 23 matters falling within subparagraphs (a) to (e) of the
 24 public authority clause naturally fall within
 25 identifiable legal or statutory powers.

1 Sixthly, if the distinction is not between what is
 2 mandatory and what is voluntary, in the sense in which
 3 I have used those expressions, how on earth is one to
 4 apply it? How does anyone know where they are in
 5 relation to this important contractual trigger?
 6 There is a point on certainty here. Surely the
 7 natural point at which restrictions are imposed is when
 8 regulations are passed which have the effect of, as they
 9 themselves say, imposing restrictions .
 10 Sixthly, and this is important my Lords, unusually
 11 for a point that comes sixthly, I have already said that
 12 one has to construe the wordings at the time of entering
 13 the contract and without knowledge of the unprecedented
 14 events of the last few months, in which the government
 15 has told people to behave in all sorts of highly
 16 intrusive ways. Falling short of legal regulation .
 17 We have all been unable to resist examples which,
 18 according to taste, involve five helpings of fruit and
 19 veg a day or some implausibly small number of alcoholic
 20 units per week, and in a sense they are on one side, but
 21 the important point is this -- those are obviously not
 22 mandatory -- that the whole idea, viewed from the
 23 perspective of the contract date, of the government
 24 ordering us to do things in a non-legally binding way is
 25 completely unfamiliar . The whole concept of

1 restrictions imposed other than with legal authority or
 2 authority of law is bizarre. Indeed, to people
 3 interested and concerned about the rule of law in this
 4 case it has been a troubling feature of this crisis.
 5 If one had asked the parties at the time of entering
 6 into these contracts: do you contemplate restrictions
 7 imposed by a public authority other than by operation of
 8 law? The answer would have been: what are you talking
 9 about? What sort of a country do you think we live in?
 10 Faced with this language, the FCA has to accept that
 11 the phrase denotes only things which are mandatory and
 12 compulsory. It is therefore common ground that the
 13 parties would have agreed that only compulsion or
 14 prohibition can qualify as restrictions imposed.
 15 We naturally accept that insofar as regulations were
 16 promulgated by statutory instrument, requiring people to
 17 do or not to do something, they qualify as restrictions
 18 imposed, obviously. So the simple question that remains
 19 is whether any pronouncement, fiat, advice, ukase, not
 20 contained in regulations was mandatory.
 21 Now the FCA's case, as your Lordships know, is that
 22 everything that the Prime Minister or other ministers,
 23 and I expect government scientific advisers too, I am
 24 not quite clear how far it goes, everything that the
 25 government said by way of guidance, exhortation, urging

1 and instruction was mandatory and compulsory and,
 2 insofar as it asked or told people not to do things, was
 3 a prohibition. That is taken from paragraph 13.1 of the
 4 reply.
 5 My Lord, I understand that the FCA has undertaken to
 6 put forward policyholder's arguments in this test case,
 7 but there must be a limit, my Lord, and the way in which
 8 the FCA puts this case in its skeleton is remarkable.
 9 That which the government would expect UK citizens
 10 to comply with is compulsory; that is paragraph 123. In
 11 paragraph 375 we get the idea of compulsion on the
 12 "say-so" of the government. This extends to "advice";
 13 to what the government was "asking" people to do; what
 14 they "should" do; and what, in a peculiar phrase, the
 15 government would "no longer be supporting". I don't
 16 blame my learned friends for that phrase, I have no
 17 doubt it came from the Prime Minister or one of his
 18 ministers.
 19 It is said in paragraph 376, but my learned friend
 20 by mistake, as I will show your Lordships, retreated
 21 from it, but it is said that all of this is "not
 22 voluntary"; paragraph 376. And in a curiously Victorian
 23 phrase, reminiscent of Frances Hodgson Burnett, in
 24 paragraph 377 we are told it is all a question of how
 25 these statements would be received by the "populous".

1 Perhaps most Orwellian of all was the FCA's
 2 suggestion on {Day1/63:1} that the guidance should be
 3 regarded as mandatory -- may we just get that up,
 4 please -- lines 8 to 9 on the screen. Yes. At line 6:
 5 "Behind the government's announcement [this is my
 6 learned friend Mr Edelman] telling people what they thus
 7 do was an appeal to comply [that must be 'voluntarily']
 8 in order to avoid or minimise the government being
 9 enforced to invoke the law."
 10 My learned friend, with respect to him, misspoke
 11 there. His case is that it wasn't voluntarily. But if
 12 that is right, he has given the game away and what, in
 13 this Orwellian phrase of my learned friends, your
 14 Lordships are invited to suggest is that the request
 15 that guidance be complied with voluntarily should be
 16 regarded as compulsory, because it carried the threat
 17 that the law could always make.
 18 My Lords, all of this is fallacious and it is not
 19 necessary to spend any time on it. The
 20 Amlin/ Ecclesiastical skeleton treats the arguments
 21 crisply at paragraph 33, and we echo in our own inferior
 22 way these points in our skeleton at paragraph 210.
 23 But I need to say a little more on this. First, it
 24 is important to understand why the FCA commits itself to
 25 this extremely unattractive argument. It is an

1 important part of its overall goal of blurring every
 2 different thing into one indivisible amorphous mass. If
 3 the Hiscox wordings, on their true construction,
 4 however, require a distinction between mandatory
 5 restrictions and non-mandatory guidance, one would have
 6 thought that the rational reaction was to ask which were
 7 mandatory, in the sense I have suggested, and which were
 8 not, and to recognise that the wordings only respond in
 9 the event and to the extent of the former.
 10 But that approach will not serve the FCA's purpose.
 11 Of course its primary aim, as we have seen, is to render
 12 insurers liable for all the consequences of A; but if it
 13 can't do that, its next aim is to expand B as widely as
 14 possible so as to make B encompass everything that
 15 happened, and in due course they will do the same with C
 16 and D.
 17 it follows from our submission, if we are right,
 18 that voluntary guidance, for example social distancing,
 19 falls outside the clause and cannot be relied upon as or
 20 in the context of denial of access or inability to use
 21 or for the purposes of causation and counterfactual.
 22 But it also means this, my Lord, and it is time to
 23 correct something that your Lordships were told on
 24 Day 1, it also means that the effects of people
 25 voluntarily staying away from businesses cannot be

1 within the clauses. Let us take the lockdown
 2 regulation, lockdown 6.
 3 We will submit in due course that the lockdown does
 4 not engage either of the clauses that we are concerned
 5 with, but suppose that we are wrong about that, just for
 6 a moment. Even so, the lockdown was subject to the
 7 regime in regulation 6(2). {J/16/4}, please. There is
 8 regulation 6.
 9 By way of example, any category 3 businesses, namely
 10 those identified within part 3 of schedule 2 of the
 11 26 March regulations, were expressly permitted to stay
 12 open; see regulation 6(2)(a). The FCA agrees; see
 13 paragraph 64.3 of its skeleton. It follows that there
 14 must, ipso facto, have been a reasonable excuse to visit
 15 them, or at least that there could have been
 16 a reasonable excuse to visit them. There is a symmetry
 17 in the regulations between the businesses that are
 18 allowed to stay open, and the justifications in the form
 19 of reasonable excuses for people leaving home.
 20 For example, to identify businesses within Part 3 of
 21 Schedule 2 referred to there, psychiatrists, dry
 22 cleaners, agricultural supply shops, osteopaths. I am
 23 not seeking to apply the ejusdem genesis rule to those
 24 categories, but they are four categories within Part 3
 25 of Schedule 2 that were expressly allowed to stay open.

1 If we could have page 11 {J/16/11}. It is
 2 paragraphs 24 to 42, but your Lordship gets the flavour
 3 of it from that page: all the businesses in Part 3.
 4 So if people chose not to visit those sorts of
 5 professionals, albeit that they had or may have had
 6 reasonable excuse to do so, that cannot have been as
 7 a result of restrictions imposed by public authorities,
 8 because there were none.
 9 It is difficult to see how any person carrying on
 10 a business identified there, the osteopaths and the
 11 agricultural shops and so on, could bring a claim under
 12 either clause. But I can tell your Lordship that people
 13 within Part 3 of Schedule 2 have brought such claims.
 14 Now I need to correct something that my learned
 15 friend Ms Mulcahy said on {Day1/37:37}. It is an
 16 understandable mistake, if I may say so. She told your
 17 Lordships on Day 1 at page 37 that 26 March regulations
 18 imposed restrictions on Category 3 businesses. Does
 19 your Lordship see that at lines 5 to 6.
 20 She justified that submission not by reference to
 21 the regulation, which would have been difficult, but by
 22 reference to the Explanatory Note, no doubt drafted in
 23 as much haste as the regulations themselves. She is
 24 absolutely right that the Explanatory Note on page 12 of
 25 {J/16/12} -- can we blow that up a little bit, please,

1 if possible, thank you -- the Explanatory Note says
 2 after the first sentence in the third line:
 3 "... restrictions are imposed on businesses listed
 4 in Part 3 of Schedule 2 which are permitted to remain
 5 open."
 6 She is right that that is what the note says. The
 7 trouble is the note is wrong. There are no restrictions
 8 on Category 3 businesses in these regulations, ie those
 9 named in Part 3 of Schedule 2. You will search the
 10 regulations in vain for any. It won't take you long.
 11 There are none.
 12 The likely explanation for the mistake in
 13 Explanatory Note is that the word "not" has been left
 14 out in haste before the word "listed" in the fourth
 15 line. And that explanation, if we insert that, brings
 16 the Explanatory Note, if we can go back to page 3, into
 17 line with regulation 5.1 {J/16/3}, where we see the
 18 restrictions on business in regulation 4:
 19 "A person responsible [I am reading 5.1] for
 20 carrying on a business not listed in Part 3 of Schedule
 21 2 must ..."
 22 There we see the restrictions. Anyway, I am sure my
 23 learned friends have plenty to do in reply, but if they
 24 could prove us wrong by showing us the restrictions on
 25 businesses in Part 3 of Schedule 2 in these regulations

1 I will apologise.
 2 Now that is all I want to say by way of submissions
 3 on matters which are common to both clauses. I will
 4 leave the question of interruption over to a later
 5 stage. It is convenient to deal with that immediately
 6 after "inability to use", because the two in a sense go
 7 together.
 8 So I am now going to go on to the NDDA cause. The
 9 argument for an indemnity under the NDDA clause is so
 10 feeble that even the HAG Interveners, the Hiscox Action
 11 Group Interveners are not bothering to advance it.
 12 There are four points. It seems a pity to spend
 13 valuable time on this, but I must, partly because it
 14 helps to set the tone as it were for the debate under
 15 the public authority clause. There are four points
 16 identified in our skeleton at paragraph 84. First there
 17 was no incident. Secondly, there was no incident within
 18 one mile of the insured premises, or occasionally the
 19 vicinity of the insured premises. Thirdly, there was no
 20 denial of or hindrance in access imposed. Fourthly,
 21 even if there was a denial of or hindrance in access
 22 imposed it was not the incident within a 1 mile radius
 23 or the vicinity which resulted in the denial of or
 24 hindrance in access, the causation requirement within
 25 the clause.

1 Can I then spend a moment on -- and this is by way
 2 of supplement to the general submission that I made at
 3 an earlier point this morning -- can I come back to the
 4 word "incident", "an incident". For the moment I am
 5 going to -- no, that is what I am going to do.
 6 We have seen what is meant in law and in ordinary
 7 parlance by an incident. It is important not to
 8 construe the word in isolation. So what helps does the
 9 clause give us as to the meaning of "incident". The
 10 incident has to be one which, as the clause
 11 contemplates, is the sort of incident that can be said
 12 and verified to occur within a 1 mile radius or the
 13 vicinity.
 14 Secondly, it has to be the sort of incident that the
 15 parties at the time of contracting would have
 16 contemplated was liable to cause the public authorities,
 17 or the other authorities named, to deny or hinder
 18 access. It is that sort of incident with those
 19 characteristics that is meant.
 20 We can all easily imagine the sort of incident which
 21 the clause contemplates as paradigm: a burst water main,
 22 a gas leak, a traffic accident, a crime.
 23 Clearly a global pandemic which led to unprecedented
 24 measures could hardly be further away from this sort of
 25 incident that the parties must have had in mind. Indeed

1 if you were trying for the purposes of an academic
 2 exercise to think of something least like an incident
 3 a pandemic would come pretty close.
 4 It is worth reminding oneself, so eloquent is
 5 Mr Edelman, that one has to remind oneself that this
 6 clause makes no mention of disease at all. It is the
 7 most formidably Procrustean undertaking on the part of
 8 the FCA to try to force COVID into this clause in the
 9 first place.
 10 However, the FCA will have none of this. It says in
 11 paragraph 714, it actually says about this clause:
 12 "A pandemic is contemplated".
 13 That is its primary case. We will to agree to
 14 differ on that.
 15 Of course the FCA needs the incident to be the
 16 pandemic because, looking ahead to a later element in
 17 the clause, nothing less than a pandemic caused the
 18 government reaction which is the alleged denial or
 19 hindrance in access. But as I have already submitted,
 20 an incident like an occurrence is not a national or
 21 international state of affairs which has persisted and
 22 appears likely to persist indefinitely. The pandemic,
 23 as we say in our skeleton, is too geographically
 24 dispersed, too prolonged, too variegated, too
 25 non-specific to qualify as an incident within the

1 ordinary meaning of the word.
 2 I have already explained that the cause of the
 3 government measures, and indeed the pandemic itself, is
 4 a whole set of things extending into the future; a great
 5 mass of unpredictable causal influences on the
 6 government's decision to take these astonishing
 7 measures.
 8 But even if one were to accept that the pandemic is
 9 no more than the set of individual cases of the disease
 10 in existence at the time of the measures. The set of
 11 the incidents is not itself an incident.
 12 Outside the obscurer regions of Russell's paradox
 13 a set is not a member of itself. Hence the examples of
 14 the blitz and of recent protests that we give in our
 15 skeleton at paragraphs 91 to 92.
 16 The FCA's alternative case is that there is an
 17 incident within the clause when someone with the disease
 18 is shown to be within the radius.
 19 Now this alternative definition of "incident", even
 20 if it were made out, is of course not going to help the
 21 FCA because even if one puts entirely on one side major
 22 questions about proof of prevalence it is going to be
 23 quite impossible for the FCA to prove that anything
 24 which happened within the radius caused the government
 25 measures.

1 But for the moment the question is this: is the
 2 presence, and I emphasise the word "presence", of
 3 someone within the circle the sort of incident
 4 contemplated by the clause.
 5 Note this is how it is put by the FCA. They have
 6 got an eye to difficulties of proof, and so they don't
 7 seek to say, as one might have thought they might, that
 8 the infection within the radius is the incident. It is
 9 the presence of a person that is said to be the
 10 incident.
 11 But this is even more hopeless. Even if one regards
 12 the government as somehow reacting to an individual case
 13 of disease within the radius, it is the fact that the
 14 person has acquired the disease that matters, not the
 15 precise movements of that person either side of an
 16 imaginary circular line that matter. They are not of
 17 the slightest interest to anybody.
 18 So as an incident, meaning the sort of incident
 19 which this clause contemplates causing a denial of
 20 access, the person with COVID crossing this notional
 21 line is a nonstarter. He might come and go without ever
 22 knowing he had the disease; he would behave in just the
 23 same way he was asymptomatic as if he was not infected;
 24 people would look at him and not know he was infected.
 25 Such an undetectable happening cannot be the sort of

1 thing which the clause contemplates as an incident
 2 liable to result in a denial of access.
 3 Moreover, as we say in your skeleton, paragraph 267,
 4 in the context of the public authority clause, let us
 5 assume that the whole of the FCA's case on prevalence is
 6 made good. That means that the existence of an incident
 7 within 1 mile of an insured's premises can be proved by
 8 an analysis of data: the application of averages and the
 9 use of an undercounting regime. Assuming that all this
 10 is allowable, it will in many cases prove for the first
 11 time the existence of the disease within a particular
 12 area.
 13 So the presence of someone with the disease will
 14 have been proved not in March, not today, but at some
 15 point in the future.
 16 Now of course, as we are reminded by the FCA, trees
 17 fall in woods even when they are not seen to do so.
 18 I hope we are not guilty of saying anything different.
 19 That is not the point. The question is whether the
 20 parties were contemplating as an incident resulting in a
 21 public authority action, the sort of thing which nobody
 22 might know about for many months, if ever. And we
 23 submit that the answer is no.
 24 My Lord, it has been a longish morning. I am happy
 25 to pause there, or I have got another heavy -- it might

1 take me a little more than five minutes.
 2 LORD JUSTICE FLAUX: Why don't we break now for lunch. If
 3 we say just before 2 o'clock. All right.
 4 (12.56 pm)
 5 (The short adjournment)
 6 (1.58 pm)
 7 LORD JUSTICE FLAUX: When you're ready, Mr Gaisman.
 8 MR GAISMAN: My Lords, the next heading is "Incident
 9 occurring within the radius".
 10 This issue only arises on the FCA's primary case as
 11 to the meaning of "incident". Clearly, if someone with
 12 the disease is what an incident means, someone with the
 13 disease within the radius is within the radius. How one
 14 might prove that is a different question, which I'm not
 15 addressing.
 16 So we are setting on one side the case of the
 17 individual presence of the disease within the radius,
 18 and dealing with the primary case. Therefore, the
 19 question reduces to this: is the pandemic meaning more
 20 than, but if not, at least, the aggregation of all cases
 21 of the disease which caused the government measures, is
 22 the pandemic, in that sense, an incident occurring
 23 within the radius, 1 mile or vicinity?
 24 Obviously not. This does not depend upon the
 25 meaning of the word "within", although I will come to

1 it. The radius requirement is obviously in the clause
 2 to confine cover to local events, very local in the case
 3 of 1 mile. A pandemic is the antithesis of a local
 4 event.
 5 The FCA says that the pandemic was everywhere in the
 6 UK. Well of course, as we know, that is not even true
 7 of cases of the disease itself. It may be true in
 8 a general sense of the emergency or of the government
 9 measures taken in response. But I want to ask a rather
 10 more fundamental question. What does it mean to say
 11 that the pandemic was everywhere in the UK? The
 12 pandemic of COVID is different from the individual
 13 cases, but to say that COVID is everywhere in the UK is
 14 actually a figure of speech.
 15 The statement operates on a quite different plane of
 16 meaning from the requirements stipulated by the clause.
 17 Let me give an obvious example. Assume that the room
 18 from which I am speaking contains neither a sufferer
 19 from COVID nor the virus itself. To say that the
 20 pandemic is everywhere in the UK does not mean that the
 21 pandemic is in this room. Far from being a necessary
 22 corollary to the statement that the pandemic is
 23 everywhere in the UK, to say that the pandemic is in
 24 this room is actually a nonsense statement. It is like
 25 saying that World War II was in a library in Newcastle

1 on the second Tuesday in January in 1943. It is
 2 meaningless.
 3 It is equally meaningless to say that the pandemic
 4 is within 10 yards of this room, or 100 yards of this
 5 room, or 1 mile of this room. It is everywhere, but
 6 nowhere in particular. And even if the FCA was right to
 7 say that "within" means both inside and outside the
 8 radius, the pandemic is not and no part of it is within
 9 the radius.
 10 The requirement that an incident must occur within
 11 a 1 mile radius is a stipulation of a specific
 12 geographical condition which must be satisfied. To say
 13 that the pandemic is everywhere is poetic, but does not
 14 satisfy that unpoetic condition.
 15 But in fact insurers are also right, although they
 16 don't need to be, to say that the preposition "within"
 17 denotes that the incident must be within the circle and
 18 not outside it, as in phrases such as "within these four
 19 walls" or "these premises are supervised within the
 20 hours of daylight", meaning during the day and not
 21 otherwise.
 22 The purpose of the requirement is to ensure that
 23 local events are covered, and only local events. Why
 24 else is the requirement for proximity inserted? Your
 25 Lordships have well in mind the point that on the FCA's

1 case the radius requirement serves no useful purpose at
 2 all .
 3 The sort of ordinary incident contemplated by this
 4 clause would ordinarily have no difficulty in satisfying
 5 this criterion . Of course there might be borderline
 6 cases, but this is not a borderline case. Clearly the
 7 pandemic is in no sense local .
 8 The next requirement under the NDDA clause, the
 9 third condition , is access , which has to be denied or
 10 hindered . The clause requires a denial of or hindrance
 11 in access . This access is a specific concept; it means
 12 a way or means of approach or entrance . That is its
 13 common ground meaning, as we see from the FCA's skeleton
 14 at paragraph 153 .
 15 It means that a notional person nearing a building
 16 or at its front door is stopped or hindered from
 17 proceeding any further . In the normal case of a gas
 18 leak, a crime scene or a traffic incident , the denial or
 19 hindrance of access will be obvious and uncontroversial ,
 20 and there is no need to give these words a strained
 21 meaning but that is exactly what the FCA does . It is an
 22 abuse of language to say that someone who sets out from
 23 his home, 100 miles away, intending to visit a business
 24 and who finds that the local bus which he needs to take
 25 to the station to catch the train to the business is not

1 running, it is an abuse of language to say that he has
 2 been hindered in access to the business .
 3 Not only is it not an available use of language but
 4 also our submission is consistent with an American case
 5 cited in footnote 115 of Zurich's skeleton , a case
 6 called *Bienville v ACA*, which decided that the Federal
 7 Aviation Authority's closure of all the airports in
 8 America after 9/11 did not constitute a denial of access
 9 to a particular New Orleans hotel. Hardly a surprising
 10 result .
 11 It is a misuse of language to say that a man
 12 confined to his house in Manchester has been denied
 13 access to every business that he wants to visit . He is
 14 not denied access to a business in London. He is, to
 15 the extent that he is , denied egress from the home in
 16 Manchester. Accessing a building is different from
 17 using it . Use is dealt with in the public authority
 18 clause . They are different concepts . As is proved by
 19 the fact that you need access to a building in order to
 20 use it , but that simply shows they are different things .
 21 Moreover, you may be permitted to access a building but
 22 not permitted to use it , like the restaurateur who lives
 23 over the shop, so to speak . They are different things .
 24 Now, use of premises may have been rendered legally
 25 impossible , depending on the type of business and

1 whether it was required to close . Inability to use, as
 2 I say, is covered by the public authority clause . But
 3 giving the word its ordinary meaning, "access" was never
 4 denied or hindered .
 5 Moreover, the Hiscox NDDA clause, as you see from
 6 page 41 of the bundle, does not contain any pronoun
 7 before "denial" . This is to be contrasted with the
 8 reference to denial of access in the general denial of
 9 access clause and in the bomb threat clause in the
 10 Hiscox 1 wording, both of which refer to "your access"
 11 There are two possible explanations . Either the
 12 word "your" is to be understood as there being no reason
 13 to suppose that there was intended to be any difference
 14 between the three cases, or what is referred to is
 15 a general denial of access to all members of the public .
 16 The denial or hindrance in access referred to has to
 17 apply indifferently to all members of the public, that
 18 is clearly what is intended . The incident has to result
 19 in no one being able to access the premises or everyone
 20 being hindered in doing so . In the paradigm case of the
 21 operation of this clause, the bomb scare or the gas
 22 leak, none of this would give rise to any difficulty .
 23 From which it follows that it is not enough to trigger
 24 the clause that a certain class of people cannot get
 25 access, the denial of access has to be to the public as

1 a whole .
 2 There is one potential situation in which the
 3 clause, the hindering of access might apply, because one
 4 of the things which is relied upon in the FCA's case is
 5 social distancing , and the point is made that if you
 6 have to queue outside a shop because you are only
 7 allowed in two by two, and then two metres apart, you
 8 are being hindered in your access to the building .
 9 Well, your Lordships don't need to decide whether
 10 that is right or wrong if, as I submit we plainly are,
 11 we are right , in our important point that I developed
 12 earlier this morning, that the clause requires that the
 13 denial of or hindrance in access has been imposed by the
 14 relevant authority , and social distancing was not
 15 imposed in that sense .
 16 So we submit that our primary case is that there was
 17 no denial of or hindrance in access , properly
 18 understood, that term being properly understood, in
 19 relation to any business . Alternatively , and if we are
 20 wrong about that, any business except those required to
 21 close by regulations 4 and 5 of 26 March regulations and
 22 their predecessors .
 23 Again, Zurich cites US authority on point . The case
 24 of *Syufy Enterprises v Home Insurance* referred to in
 25 paragraph 119 of its skeleton , {1/19/52} was a case of

1 a dusk till dawn curfew in a city , held not to amount to
2 a " specific prohibition " of access to a theatre in the
3 City. The result would have been no different if the
4 word " specific " had been absent.

5 So none of curfew, house arrest , imprisonment,
6 regulation 6, amounts to a denial or hindrance of the
7 right to approach and enter a place .

8 The FCA's case, by contrast, has to be that
9 regulation 6 was the imposition of a denial of or
10 hindrance in access to all insured premises everywhere.

11 Nor is there anything surprising about the
12 conclusion for which Hiscox argues under this clause, it
13 is an extension of a property damage business
14 interruption cover, it is workable, sensible ,
15 comprehensible, has plenty of scope for application in
16 the real world. It would readily respond to action by
17 the authorities , resulting from local danger or
18 disturbance and in the prevention of physical or legal
19 access. These are the types of situation that the
20 clause was designed to meet.

21 The fourth and final point is , of course, causation
22 within the NDDA clause. This is perhaps the most
23 difficult for the FCA of all -- a hotly contested
24 title -- it is the fact that the incident within the
25 1 mile radius did not result in the imposition of or

1 denial of hindrances in access, as the clause says it
2 must.

3 I have already identified what I call the bind which
4 the FCA is in. Just to repeat it, the pandemic
5 emergency, as I have explained it, caused the government
6 measures, but was not an incident within the 1 mile.
7 Whatever was within the 1 mile, nonsensically a little
8 bit of the pandemic or, so the FCA says, an individual
9 case, albeit in many cases only to be proved by
10 scientific evidence hereafter, did not in any sense
11 cause the government measures.

12 This bind is no surprise, because it is a function
13 of the attempt to make this clause and also the public
14 authority clause, as we will see, apply to a situation
15 for which it was never intended.

16 There is no need to spend long on this point
17 separately. We have dealt it with in our skeleton,
18 where, for example in paragraph 129, we draw attention
19 to paragraph 53 of the particulars of claim, and its
20 tortured parentheses all apparently within the
21 understanding of the reasonable citizen whose spectacles
22 we are supposed to put on while construing this
23 contract.

24 I just add two points in relation to the FCA's
25 alternative case.

1 First, where there is a national pandemic and
2 government intervention, what rational reason could
3 there be for providing cover to business A, because it
4 so happened to be just within a mile of a care home
5 where COVID had taken place, and not to business B,
6 which was just over a mile away, when both of them have
7 suffered business interruption loss through precisely
8 the same pandemic? The assumption I am making is that
9 the pandemic is somehow covered.

10 Secondly, a connected point, if the insured has
11 difficulty in proving either that illness was sustained
12 within the radius or that such illness caused the
13 interruption, that is because the cover was objectively
14 intended to respond to a situation which was local and
15 provable. In the present situation, we have not only
16 a national/ international situation, but if one starts
17 trying to apply the clause to that type of situation, it
18 is hardly surprising that fraught epidemiological
19 questions are going to arise.

20 That is all I want to say about the NDDA clause and
21 I turn to the public authority clause.

22 Much of what I have already said is relevant to this
23 clause. In particular, I have already pointed out that
24 the clause requires nothing more and nothing less than
25 an occurrence of a notifiable disease as the reason why

1 the public authority restrictions are imposed. I have
2 explained why it does not make sense to treat the
3 circumstances which led to the government's measures
4 of March 2020 as an occurrence. I will come back to
5 that. It is actually a point which needs to be added in
6 as an additional point in the summary in our skeleton at
7 154.

8 Can I first say something very briefly, because
9 I have really covered this ground, about the structure
10 of the public authority clause.

11 Your Lordships have {B/6/42}. It is now familiar
12 territory even to your Lordships, who have dozens of
13 different wordings to grapple with. We look at this and
14 we wonder how anybody can call that public authority
15 clause a disease clause. It almost beggars belief.
16 However, that is exactly what the FCA does call it. We
17 collect the references in existence at the time in
18 footnote 151 of our skeleton. But on Day1, loyal to the
19 position which the FCA takes, both my learned friends
20 Mr Edelman and Ms Mulcahy referred to it in these terms.
21 Just as one example, my learned friend Ms Mulcahy
22 referred to the "Hiscox disease clauses"; that is
23 page 55, line 14. {Day1/55:14} This is a complete
24 misnomer and an unvarnished attempt to beg the question,
25 a rather important question. And of course the reason

1 why the FCA does this is because it has an eye on
 2 causation and it wants to soften up the ground in
 3 preparation for submissions such as are contained in
 4 paragraph 421 of its skeleton, the cover is for the
 5 effects of disease as long as there is something extra.
 6 Now we have already covered this ground. As I said
 7 this morning, we conduct a careful analysis of the
 8 structure and syntax of this clause in our skeleton at
 9 paragraphs 149 to 153. {1/13/48} I have already made
 10 submissions about how the restrictions are the core of
 11 the insured peril, and I am relying on, as I said, the
 12 title of the clause, the language and structure of the
 13 clause, the substance of the clause, and other
 14 non-coverage provisions, in particular the indemnity
 15 period, the under-insurance clause, in some cases the
 16 trends clauses, which refer to the peril as the
 17 "restriction".
 18 So taking my earlier submissions as it were
 19 incorporated by reference, I now come back to the
 20 meaning of the word "occurrence". To be quite clear,
 21 the phrase is "an occurrence of any" -- I paraphrase --
 22 "infectious or contagious disease".
 23 Now, we have a positive case on this and a negative
 24 case on this, and one is simply the obverse of the
 25 other. The negative case is to say that this phrase

1 does not mean, nor encompass, the emergency, the
 2 pandemic as it was in March, in the sense that
 3 I described it this morning, the conglomeration of
 4 existing cases, apprehensions of future development,
 5 scientific modelling, the imperative need to protect the
 6 NHS, and the vast range of considerations which were the
 7 true cause of the government measures, as the occurrence
 8 has in some senses caused the measures here.
 9 The positive case, which is simply the obverse of
 10 the negative, as I say, is that the phrase "an
 11 occurrence of any infectious or contagious disease"
 12 therefore means something limited, small scale, local
 13 and in some sense specific to the insured. It may be
 14 difficult to define those criteria with absolute
 15 precision, but that is often true of contractual terms
 16 and the court is not writing an essay, as was observed
 17 at the first case management conference, but simply
 18 performing the everyday exercise of construing a clause
 19 and answering the question of whether a given set of
 20 facts falls within the clause and in either case,
 21 whether it does or it doesn't, providing reasons.
 22 Now, the FCA caricatures this argument as merely an
 23 attempt on Hiscox's part to imply a geographical
 24 limitation to the occurrence; for example, paragraph 345
 25 of its skeleton. That is wrong in two respects.

1 First, it is not a question of the implication of
 2 terms at all. We have disposed of this canard in
 3 paragraphs 219 to 222 of our skeleton. Both sides
 4 invite the court to construe certain terms in the
 5 wordings by supplying additional words which are not
 6 there. So, for example, the FCA says that "inability to
 7 use" means inability to use in whole or part. I am not
 8 accusing, of course I am not, the FCA of trying to imply
 9 a term. That would be a very wooden accusation. I say
 10 that they are wrong, but what they are doing is
 11 a perfectly legitimate thing in principle, which is to
 12 invite the court to understand the meaning of words in
 13 a contract. That is not implication of terms, whichever
 14 side is doing it.
 15 Secondly, to reduce the argument to an attempt to
 16 draw a radius around the circle is to oversimplify it.
 17 The question is not simply whether a case in Alnwick is
 18 an occurrence for the purposes of a business
 19 interruption cover in Ilfracombe, it is much more than
 20 that, and much of my argument does not even require me
 21 to be right on that point, although it will follow, or
 22 it may follow, that I am.
 23 I have already addressed the reasons why the
 24 emergency which caused the government restrictions were
 25 something of a quite different order of magnitude from

1 an occurrence as contemplated by the clause. It is an
 2 argument that takes its point of departure from
 3 paragraph 43 of the particulars of claim, which I read
 4 to your Lordships this morning. But there are several
 5 further points which support my submission, and some of
 6 these are reactive to things that were said during the
 7 course of argument.
 8 As I have already submitted, my Lord
 9 Lord Justice Flaux was, with respect, right to stress at
 10 the outset of the FCA's submission this clause
 11 stipulates for an occurrence, not lots of occurrences,
 12 but an occurrence; {Day2/130:1}. The way in which my
 13 learned friend Mr Edelman came back on that was to say:
 14 ah but look, it is an outbreak. An occurrence of any
 15 human disease, an outbreak of which must be notified to
 16 the local authority.
 17 There is nothing in the word "outbreak" which
 18 implies some alteration of the order of magnitude of the
 19 occurrence. An outbreak can after all mean one or two
 20 occurrences. All that the word "outbreak" is doing is
 21 indicating that it must be a disease which, if an
 22 outbreak occurs, is notifiable.
 23 To say, as the FCA did, that "outbreak" is apt to
 24 cover a multitude of cases is, in context, either wrong
 25 or beside the point. Indeed, for good measure, I am

1 sorry about this wrinkle, in all the Hiscox 2 wordings
 2 the word "outbreak" is not even present in the public
 3 authority clause, but only in the definition of
 4 a Notifiable Disease. The same is also true of the
 5 Hiscox 4 wordings. Would your Lordship like me to make
 6 that point good? It is {B/7/25}, clause 5(b).
 7 MR JUSTICE BUTCHER: "Notifiable Disease" is defined in
 8 terms of an outbreak which must be notified.
 9 MR GAISMAN: It is, my Lord, yes, that is true. But if one
 10 is looking at the clause itself, it reinforces my point
 11 that the word "outbreak" is merely there to define that
 12 which it is which must be reported, namely an outbreak.
 13 That is all I am saying. I would not try to say any
 14 more than that.
 15 LORD JUSTICE FLAUX: Hiscox 2 just says "Notifiable
 16 Disease", defined as being a disease, an outbreak of
 17 which has to be notified to a local authority. Hiscox 1
 18 simply spells it out. But your point is that either way
 19 what it is talking about is a notifiable disease. It is
 20 not saying that there is only an occurrence in
 21 circumstances where there has been an outbreak in the
 22 locality so that it has been notified, because if that
 23 is all it meant it would say so, and it doesn't.
 24 MR GAISMAN: Yes, the point is in a sense the converse.
 25 I am not making much of the fact, or indeed I don't

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1 think I am making any anything of the fact that in
 2 Hiscox 1 it says "local authority", and that is simply
 3 describing the criterion of notifiability.
 4 MR JUSTICE BUTCHER: Yes, I understood that. It seemed to
 5 me that when one first read that clause you might think
 6 that that was a pointer towards locality, but as
 7 I understand it you don't make that point at all, you
 8 just say that that is a way of defining the disease,
 9 which could also be described as a notifiable disease.
 10 MR GAISMAN: My Lord, there would be no point, of course,
 11 which I would not adopt if I thought it helped, but I am
 12 struggling to adopt that one.
 13 LORD JUSTICE FLAUX: Right.
 14 MR GAISMAN: Where we go from there is this that the FCA
 15 says, on {Day2/132:1} they say: well, Hiscox say that
 16 they can't have been intended to cover misfortune whose
 17 character is that they may affect the whole nation. And
 18 my learned friend then gave examples of widespread
 19 storms and floods which he said could affect "the whole
 20 nation"; that is {Day2/133:4}.
 21 My Lord, those are far-fetched examples indeed. A
 22 nationwide flood or storm has, as far as I'm aware,
 23 never happened in the UK and cannot be presumed to have
 24 been within the parties' contemplation. To be sure one
 25 can have a large local event, like the great fire of

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1 London, or you can have a small local event like the
 2 house next door going up in flames, but both of those
 3 events are local. And if there is a huge storm across
 4 the UK, then insureds in both Alnwick and Ilfracombe
 5 might face property damage causing a business
 6 interruption. But if there is an outbreak of measles in
 7 Alnwick, the overwhelming likelihood, viewed
 8 prospectively, is that that is not going to cause a
 9 restriction making an insured in Ilfracombe unable to
 10 use its premises.
 11 Moving on, my Lords, I am going to have something to
 12 say about noscitur a sociis, and it is not confined to
 13 lists. Before I get there, before I get to that common
 14 sense anti-literalist maxim, consider the fact, if we
 15 can go back to the public authority clause in Hiscox 1
 16 on page 42, that the public authority that is being
 17 referred to in that clause is the same public
 18 authority -- I am not saying that the word can't embrace
 19 national government, but let's look at the clause as
 20 a whole. The public authority that is contemplated by
 21 that clause is the same public authority as is going to
 22 impose restrictions in the event of vermin, in the event
 23 of food poisoning, in the event of a local crime or
 24 suicide. In other words, a local authority of some sort
 25 reacting to a small scale local event.

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1 These are pointers. None of these is a point which
 2 is, as it were, a knock-out blow, but what we are doing
 3 is accumulating, textually and by reference to the
 4 language of the clauses and the wordings, clues as to
 5 what the parties must have meant.
 6 By the same token, my Lords, there is in certain
 7 Hiscox 1 and Hiscox 4 wordings cancellation cover, and
 8 your Lordships see that on page 43. {B/6/43}. It is
 9 towards the foot of the page.
 10 What we see here again is a distinction between the
 11 sort of local event that we say is contemplated by the
 12 public authority clause and the exclusion from the
 13 cancellation all risks cover, because that is what
 14 it is, right at the foot of the page (iii):
 15 "Any action taken by any national or international
 16 body or agency directly or indirectly to control,
 17 prevent or suppress any infectious disease."
 18 Now, the FCA makes the facile argument that the
 19 absence of that exclusion outside the cancellation cover
 20 proves or tends to prove that Hiscox did not intend to
 21 exclude the effect of pandemics except in the
 22 cancellation cover.
 23 There are many things wrong with that argument and
 24 we summarise them in paragraphs 33 to 44 and 248 of our
 25 skeleton. However, the main point, ignored by the FCA

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1 in its oral as well as its written submissions, is that
2 this cancellation cover, unusually, because it is an add
3 on, is all risks cover.

4 The true position is that the contrast between this
5 sort of language in the cancellation cover and the more
6 prosaic confined wording in the public authority clause
7 suggests that coverage of something altogether more
8 local was objectively intended by the latter .

9 Then, my Lords, there is the cyber attack cover in
10 all but one of the Hiscox 1 wordings and two of the
11 Hiscox 4 wordings, including the lead . We can see that
12 on page 44 {B/6/44}.

13 I'm sorry, we are going to go to paragraph 44 in
14 a minute. The definition of "Cyber Attack" -- sorry the
15 cyber attack cover is on page {B/6/42} and the
16 definition is on page {B/6/40}.

17 Now, a cyber attack sounds pretty far-reaching and
18 serious, and indeed they can be for obvious reasons.
19 But if we note the definition of "Cyber Attack" on
20 page 40 {B/6/40} it is extremely confined to the
21 activities of either a third party, that is in (a), or
22 (b) a hacker who specifically targets you alone.

23 The cyber cover itself, as I said, is on page 42,
24 and on page 44 {B/6/44} we find at the top of the page
25 under the heading "What is not covered", we find this :

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1 "We will not make any payment:

2 1. For any interruption to your activities
3 directly, or indirectly caused by, resulting from or in
4 connection with ...

5 "(b) any virus which indiscriminately replicates
6 itself and is automatically disseminated on a global or
7 national scale or to an identifiable class or sector of
8 use unless created by a hacker."

9 And a hacker is somebody who is defined as somebody
10 who targets the insured .

11 Now, it is not a merely verbal point to say that the
12 nearest thing to a coronavirus contemplated by this
13 policy is a computer virus . And we say in our skeleton ,
14 at paragraph 246 that there can no clearer objective
15 indication of Hiscox's reluctance to accept liability in
16 respect of pervasive events, especially non-damage
17 related , than the words in the computer virus exclusion .
18 It is an obvious statement that given the level of
19 society 's dependence upon information technology,
20 computer viruses, just like a pandemic, have the
21 capacity to reek global havoc, indiscriminately making
22 businesses unable to function and causing devastating
23 impacts upon normal, economic and social life , and this
24 wording is an additional pointer to the fact Hiscox
25 wanted nothing to do with risks of this breadth.

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1 If one had time, one could look at many of the other
2 special covers in those cases like Hiscox 1., where they
3 apply. The picture that emerges, and we deal with this
4 in our skeleton at paragraphs 234 to 244, it is quite
5 clear that the potentially wide cover for business
6 losses has been carefully circumscribed by the draftsman
7 of these wordings with a whole variety of limiting
8 factors ; the need for material physical damage, insured
9 damage, in many cases being just one example.

10 Now let's get to the precise point. The FCA's case
11 is apparently this, that in the case of an occurrence of
12 disease alone the Hiscox underwriters are to be treated
13 as having thrown caution to the winds and assumed an
14 unfettered liability for the consequences of any
15 notifiable disease anywhere, with no proximity,
16 locality, connection with the insured or its business,
17 other than the fact of an inability to use, and all as
18 an adjunct to an adjunct to properly cover. Indeed,
19 this is what the FCA says, in paragraph 350, was what
20 was clearly intended.

21 We submit that not only is this highly improbable
22 from an objective standpoint, but on the contrary it is
23 objectively obvious that Hiscox intended no such thing.

24 I hope your Lordships won't have noted desperation
25 in my voice. I put it that way, my Lord, because the

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1 FCA describes the argument that I have just addressed to
2 your Lordship as "desperate" in their skeleton at
3 paragraph 345.

4 Well, really . But in that spirit , and since one
5 might as well be hung for a sheep as for a lamb,
6 I suggest, on the contrary, that any experienced
7 insurance lawyer who looked at the public authority
8 clause would have the same immediate reaction. Of
9 course this clause was not objectively intended to cover
10 the international and national emergency which, together
11 with all of its ramification, caused the unprecedented
12 government actions in March.

13 The FCA's literalist argument to the effect that
14 "the words can be made to mean that" -- when I say
15 quote, I don't mean that I'm quoting the language that
16 they have used, I am paraphrasing their argument that
17 the words can be made to mean this -- is in effect
18 a submission that coverage for this pandemic was
19 coverage extended by mistake.

20 My learned friend Mr Edelman himself agreed, and
21 I am now quoting him, "ordinarily one would only expect
22 a local outbreak to have the effect " of creating an
23 inability to use premises; {Day2/131:7} to line 8.
24 Indeed. And that expectation is a good reason for
25 concluding that coverage should not be extended.

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1 Now, it is time to get on, whether or not in the
 2 forbidden Latin, to noscitur a sociis. Now, my learned
 3 friend has misunderstood the main way in which we deploy
 4 this argument because, as we make plain in our skeleton
 5 at 224 to 231, we are analysing, and I emphasise this,
 6 primarily the other covers within the public authority
 7 clause, in other words, (a), (b), (c), (d) and (e), and
 8 we seek to show how they of their nature, and by
 9 reference to the sorts of public authority powers which
 10 they contemplate, must be referring to small scale local
 11 events. Of course (b) is the one we are arguing about,
 12 but I am referring to (a), (c), (d) and (e). That is
 13 the context in which we rely on the maxim.

14 Now, my learned friend said this was a maxim to do
 15 with lists, and at one point my Lord Lord Justice Flaux
 16 agreed with him, on Day 2, page 134. {Day2/134:1} With
 17 great respect, my Lord, it is not a maxim confined to
 18 lists, although it is exemplified by lists. The
 19 authority mentioned by my learned friend says as much.
 20 He cited Lewison on Contracts; we don't need to look at
 21 it but it is {K/202/57}, where the learned author
 22 summarises the effect of the maxim in a sentence:

23 "Put shortly, it stresses the importance of
 24 context."

25 Of course lists provide a context, but they are not

1 exhaustive; it is not only in the case of lists that
 2 context is important. We have found an authority, and
 3 no doubt given more time we might have found more, where
 4 the maxim was specifically applied other than in the
 5 context of lists; the decision of Mr Justice Morison,
 6 called Swiss Re v United India Insurance, and that is at
 7 {K/122.1/9} to page 10. I don't need to take
 8 your Lordship to it.

9 But more importantly and as I say, my learned
 10 friend, as you will see if you re-read {Day2/134:1} to
 11 page 135, completely passed over the fact that the
 12 primary way in which we deploy this maxim is within the
 13 public authority clause, and that is a list.

14 Now if we look at cover (a), (c), (d), (e), of the
 15 other matters within the clause, subclauses (c) and (e)
 16 are expressly confined to the insured premises. Of the
 17 other two, (a) and (d), it cannot seriously be suggested
 18 that they relate or could relate to drains problems or
 19 murders, other than at or in the vicinity of the
 20 premises.

21 The same must be true, we submit, of the occurrence
 22 of the disease in (b). The FCA says that the necessary
 23 nexus with the premises is provided by the words in the
 24 introductory part of the clause "inability to use the
 25 insured premises", but that is not the point. I am

1 deploying the maxim and the principle of construction,
 2 which has regard to context, to the nexus which is in or
 3 plainly implicit in the subclauses themselves.

4 My learned friend then quoted Lord Justice Diplock
 5 in Letang v Cooper, and I congratulate him on his
 6 pronunciation, saying that the maxim is treacherous
 7 unless you know the societas to which the socii belong.
 8 That was {M/5/16}. Within subclauses (a) to (e) the
 9 genus, or the societas is clear enough; it is causes at
 10 or local to the insured premises.

11 Now we do, I accept, broaden the analysis, although
 12 this isn't relevant to many of the covers, to other
 13 cases within the Hiscox 1 wording where, in
 14 paragraphs 234 to 244, we make the point that the other
 15 insuring clauses comprising the special covers branching
 16 off the stem are similarly local or specific either to
 17 the insured or the business or the premises.

18 That is the argument, my Lords, on occurrence, and
 19 I hope your Lordships see that it is not merely an
 20 exercise with a compass and a pencil. It is a more
 21 substantial argument than that, although the compass and
 22 the pencil, so to speak, follow in its wake.

23 There is also a non-point, which we have dealt with
 24 in paragraph 261 of our skeleton, which both the FCA and
 25 the Hiscox interveners take, that because there is

1 a 1 mile radius in Hiscox 4, it must be assumed that
 2 there was a deliberated eschewal of any limit in Hiscox
 3 1 to 3. That is a non-point, and it doesn't become any
 4 more of a point when Mr Edelman makes a sort of half
 5 allusion to the date at the bottom of Hiscox 4. That
 6 doesn't help him at all, because he hasn't established
 7 that the date at the bottom of Hiscox 4 is the first
 8 time when the geographical radius of 1 mile is put in.

9 So much, unless your Lordships have any questions,
 10 for the meaning of the word "occurrence" as it occurs in
 11 context in the public authority clause.

12 I need then very briefly to move on to causation
 13 within the public authority clause. There really is no
 14 distinct issue here. The parties are agreed that the
 15 word "following" in that clause denotes a causal
 16 element. A looser one than proximate clause, I'm not
 17 sure what proximate clause has to do with anything in
 18 this clause but anyway, never mind that, but a causal
 19 element nonetheless. That is paragraph 60 of the
 20 particulars of claim, and the amended defence, we got it
 21 right at the second time of asking, paragraph 101. The
 22 FCA accepted that causal relationship in its oral
 23 submissions on {Day2/140:1}.

24 So unless the occurrence is construed broadly enough
 25 to include what I call the real cause of the government

1 measures, it follows that the FCA will not be able to
 2 prove the required causal connection between an
 3 occurrence, wherever it is, even in Alnwick, and the
 4 restrictions imposed.
 5 The FCA does not plead that an occurrence was the
 6 nationwide pandemic, and even if it did, it obviously
 7 wasn't.
 8 The occurrence relied on appears to be the
 9 individual case or cases of a notifiable disease, but
 10 that didn't cause the government measures. Whatever the
 11 meaning and whatever the geographical ambit of an
 12 occurrence, it is not the pandemic or the emergency and,
 13 therefore, it didn't cause the restrictions. That is
 14 true not just of the Hiscox 4 wordings but of all of
 15 them.
 16 Indeed, there is obviously a knock down argument on
 17 Hiscox 4, but my learned friend Mr Edelman doesn't even
 18 accept that, because he said on {Day2/138:16} that if
 19 a case of COVID-19 happened within a mile under
 20 Hiscox 4, well then they have cover. But that totally
 21 disregards the force of the word "following" and the
 22 obvious difficulty, which I don't need to say any more
 23 about, in demonstrating that an event within a 1 mile
 24 radius caused anything.
 25 I now was going to move on, my Lords.

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1 LORD JUSTICE FLAUX: Whatever else "following" means, and
 2 you are probably right that it is a looser causal
 3 connection than other phrases like "in consequence of",
 4 and I fully take your point that we are not dealing
 5 really with proximate cause at all here, that is
 6 a different concept in a different context, that is to
 7 do with whether the insured peril has caused a loss, but
 8 "following" has to mean, doesn't it, that there is an
 9 occurrence, and you have addressed us about that, which
 10 leads to or which causes in some respect the imposition
 11 of restrictions by the relevant public authority?
 12 MR GAISMAN: That is our submission, my Lord.
 13 I was going to move on now to different questions,
 14 the questions of inability to use, and then
 15 interruption. Because if we go now to the public
 16 authority clause, I have so far said nothing about what
 17 is meant by "your inability to use the insured
 18 premises".
 19 What is the issue here? The issue is that Hiscox
 20 submits that the expression "your inability to use the
 21 insured premises" means what it says, namely that the
 22 insured must be unable to use the insured premises, and
 23 I will come back to what it means.
 24 But the FCA says that any impairment of normal use,
 25 any impairment of normal use, constitutes your inability

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1 to use the insured premises. So there is a big gap
 2 between the parties here.
 3 The first question: whose inability to use is
 4 referred to. That is easy; it is the assured's use only
 5 that is relevant, because it says "your inability to use
 6 the insured premises".
 7 The FCA agrees, paragraph 363 of its skeleton. The
 8 Hiscox interveners do not, paragraph 127 of their
 9 skeleton; they are obviously wrong and it couldn't be
 10 clearer.
 11 So whatever is meant by "inability to use", the term
 12 identifies and assumes that the insured has a purpose,
 13 and that the use of the premises is its use for the
 14 purpose of conducting its business at the premises. It
 15 is not the customer's use and purpose that is relevant.
 16 So these simple premises follow: the fact that the
 17 only use which is relevant is the insured's use, and the
 18 only person whose purposes in use are relevant is the
 19 insured's. The customer's use, in the sense of use for
 20 a purpose, is outside the ambit of the clause. Again,
 21 I remind your Lordship of the loss of attraction cover
 22 in some of the wordings. The customer's purposes, it
 23 follows, are also irrelevant. They are not attending
 24 the insured's premises for the insured's purposes but
 25 for their own.

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1 We will come on to consider how that argument works
 2 when I come on to consider, because this is what it is
 3 relevant to, whether the lockdown regulation,
 4 regulation 6, engages this clause.
 5 I am not overlooking the possibility that the
 6 customer's presence might fulfil the use of the insured,
 7 but I am delaying that point until we get to a slightly
 8 later point in the argument. All I am seeking to do now
 9 is to identify whose use and whose purpose are relevant.
 10 I hope that is clear.
 11 Next the phrase "in context". Now, again we need
 12 look at this phrase in its context, and the various
 13 subclauses (a) to (e) are an important part of the
 14 context. They clearly envisage situations in which
 15 public authority action means there is likely to be
 16 total inability to use. Murder, bad drains, vermin,
 17 Legionnaires' disease, et cetera, are likely to result
 18 in total closure for a time, not merely some form of
 19 departure from normal usage. So the clause has plenty
 20 of scope for operation on that basis and that is the
 21 natural way to read the words.
 22 Although the FCA called our construction a wholly
 23 uncommercial construction of the words in their context,
 24 {Day2/143: 1}, the FCA did not in fact address the
 25 context at all, and your Lordships were never told why

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1 Hiscox's construction was uncommercial. It is
 2 a narrower construction than the FCA's, it is true, but
 3 epithets like "uncommercial" are just used by the FCA
 4 when it has nothing substantive to say.
 5 On behalf of the Hiscox interveners, my learned
 6 friend Mr Lynch on {Day4/2:1} to page 4, seemed to
 7 advance a submission, as I understood it, that where
 8 words are capable of a broader or narrower meaning they
 9 should either be given the broader meaning or treated as
 10 embracing both, which is the same thing. I am aware of
 11 no such principle of construction.
 12 Our next submission, my Lord, is that "inability to
 13 use" means what it says. Now, the first thing we see is
 14 that this phrase is unqualified. The FCA takes a very
 15 bad point in saying: oh it doesn't say "total inability
 16 to use". We have answered that point in our skeleton in
 17 paragraph 159 and I am not going to dignify it by taking
 18 up any time on it. But it doesn't help to say that the
 19 clause doesn't say "total inability to use", which it
 20 doesn't, because it also doesn't say "inability to use
 21 in whole or part". So the question of what the clause
 22 does not say, unsurprisingly, is neutral. Because you
 23 can supply any words you like to make the point you want
 24 to make.
 25 The clause invites a simple question: is the insured

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1 unable to use its premises or not? That is a binary
 2 question to which the answer must be yes or no. And
 3 ultimately, and this is important, it is a question of
 4 fact. Can the insured use its premises or not?
 5 MR JUSTICE BUTCHER: I follow that you say it is binary and
 6 the answer must be yes or no, but it is at least
 7 possible that there are degrees of use which might
 8 qualify and might not.
 9 MR GAISMAN: Your Lordship is absolutely right. I haven't,
 10 as it were, done more than lay the groundwork for the
 11 argument yet.
 12 MR JUSTICE BUTCHER: I am sorry, Mr Gaisman, you are coming
 13 to that.
 14 MR GAISMAN: Of course. But your Lordship's may in part
 15 have been influenced, or perhaps it wasn't, I hope it
 16 wasn't, by a mischaracterisation of what our argument
 17 is. Because it is very important to be clear what I am
 18 saying and what I am not saying, although I hope that
 19 was clear from our skeleton argument.
 20 My learned friend calls our approach an absolutist
 21 one, {Day2/143:1}, but all I am saying is this, in
 22 disagreement with the FCA: an insured is not ipso facto
 23 unable to use its premises merely because it is only
 24 able to use part of them. The fact that, like most old
 25 men, I am only using 20% of the functionality of my

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1 iPhone does not mean, obviously, that I am not using it.
 2 Why is the use of insured premises any different? But
 3 I stress the words "ipso facto". I do not deny that on
 4 given facts partial use may be sufficiently nugatory,
 5 vestigial as to amount to inability to use. I don't
 6 deny that at all, and we never have. But inability to
 7 use is not proven simply or merely by showing partial
 8 inability. That is our submission.
 9 Now, I have had to spend time on that because the
 10 FCA caricatured our argument, and I am quoting from
 11 {Day2/144:1}, as saying that unless the insured can
 12 prove that he is unable to use every last square inch --
 13 that is how my learned friend Mr Edelman put it, and he
 14 said that we had a last square inch argument; bad luck,
 15 there is a square inch over there you can use, therefore
 16 you can't prove inability to use. That is a complete
 17 caricature.
 18 If I may qualify something that my Lord
 19 Lord Justice Flaux said on the next page of the
 20 transcript, possibly induced by that characterisation of
 21 our argument, there is not just a question of fact which
 22 arises if inability does not mean total inability, there
 23 is a question of fact in every case, because every case
 24 raises the question: does this inability to use
 25 constitute such an inability to use that it satisfies

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1 the clause?
 2 But what my learned friend is saying is any
 3 departure from normal usage ipso facto satisfies the
 4 clause. I hope your Lordship sees the difference
 5 between our position. I don't need to caricature my
 6 learned friend's argument, because I am able simply to
 7 quote his exact words; his position is, and he uses as
 8 an express example, that where you have a Chinese
 9 restaurant, 90% of whose business is always take-away,
 10 but it has two tables where, if you want, you can sit
 11 and eat your dim sum, he says that is an inability to
 12 use, and he said that 10% could be very important to the
 13 bottom line. No doubt it could. But it doesn't follow
 14 from that that a restaurant that is prevented from using
 15 the two tables in what is, to a vast majority, premises
 16 which are used for the purposes of a take-away, he says
 17 that is ipso facto an inability to use.
 18 I say that is a very good example of something that
 19 is not merely ipso facto not an inability to use, but on
 20 the facts isn't an inability to use.
 21 Now, whatever --
 22 LORD JUSTICE FLAUX: It will all depend on the facts, won't
 23 it? But turning it around, if you have a restaurant
 24 which before the pandemic had 100 tables and it had, on
 25 average, 5 take-away customers a week, so basically it

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1 didn't really do take-aways at all, it now finds itself
2 in a situation where it can't actually use any of the
3 100 tables for people to eat in, but it can increase its
4 capacity for take away to a limited extent, then
5 depending upon exactly how the facts pan out, that may
6 amount to an inability to use.

7 MR GAISMAN: My Lords, the short answer is yes. It is
8 difficult to paraphrase this question, but my best
9 effort at a paraphrase is to ask: can the insured use
10 the premises at all or to any meaningful extent? If it
11 can, it is not unable to use them. And it is the
12 fact-finder's prerogative in any given case to reach the
13 conclusion that so nugatory is the use which the insured
14 can make of its premises that it can't use them to any
15 meaningful extent. That is the fact-finder's
16 prerogative, as long as it applies the correct legal
17 framework.

18 MR JUSTICE BUTCHER: It might dangerous to paraphrase it
19 though, may it not? Supposing we essentially agreed
20 with the submission, it might be dangerous to go further
21 than to say it's inability to use.

22 MR GAISMAN: Yes, it rather depends whether some --
23 I understand the danger of using paraphrases. But
24 whatever your Lordships say, assuming you were
25 sympathetic to the submission, I think everybody would

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1 agree that it would be helpful if you could at least
2 give some guidance. So, for example, it is very
3 important, in our submission, to make clear that mere
4 partial ability to use does not prove inability to use,
5 which is a submission I made at --

6 LORD JUSTICE FLAUX: I think we have your submission and you
7 essentially put it in two ways: you said partial use may
8 be sufficiently vestigial to be an inability to use, and
9 then you put the same point in a slightly different way,
10 saying it may be that you can't use the premises to any
11 meaningful extent and that therefore is an inability to
12 use. So I think we understand the point that you are
13 making. Even though, obviously, anything you say is
14 going to be as a matter of principle as opposed to any
15 particular facts.

16 MR GAISMAN: No, my Lords. One notes with a rather sour
17 smile the limited role which the assumed facts are
18 playing in this case, despite the hundreds of hours that
19 were spent in attempting and indeed eventually
20 succeeding in agreeing them. But your Lordship is of
21 course right. I mean, we do have a very clear division
22 between the sides. You may not think it wise for your
23 Lordships to adopt the sort of paraphrase, but somehow
24 one has to expose the fact that what is being alleged
25 against me -- let's just see how extreme this is.

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1 The FCA says that if you adapt to the new
2 circumstances, the very fact that you have to adapt
3 means you are unable to use your premises because you
4 can't use them the way you were using them before. The
5 mere fact that -- this is the Chinese take-away
6 example -- that your usage is in some way inferior, so
7 you have lost 10% of your turnover, that mere fact is
8 sufficient to establish inability to use.

9 I mean, most astonishingly of all, both the Hiscox
10 interveners and the FCA make the submission that the
11 adoption of social distancing in a shop, say,
12 constitutes an inability to use. That is the Hiscox
13 interveners' skeleton, paragraph 127, and my learned
14 friend on {Day2/154:1}, albeit in the context of
15 interruption.

16 But even for those of us who, clad in Marigolds and
17 other devices to ward off the virus, spent 45 minutes
18 queuing outside Waitrose at least once will have found
19 it hard to accept the submission that Waitrose were
20 unable to use the premises. The proposition only has to
21 be stated.

22 I have probably said enough to expose the
23 difference.

24 LORD JUSTICE FLAUX: To quote a judge who almost said he
25 never went inside a Waitrose, let alone queued outside

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1 one. It's a quotation from Lord Justice Hobhouse in
2 some case or other. The proposition only has to be
3 stated to be rejected.

4 MR GAISMAN: All I will say to add to what I have said is
5 that short of whatever it is that amounts on given facts
6 to an inability to use, we don't accept that our
7 construction is at all uncommercial because, as I have
8 already submitted to your Lordships, the clause is aimed
9 at situations which will typically cause total
10 cessation.

11 We also have to bear in mind, we have been dealing
12 with a crisis that has lasted for months and months, but
13 the average case of defective drains or vermin or
14 a police investigation of a crime or suicide typically
15 is measured in days. One just does need to remember
16 that.

17 MR JUSTICE BUTCHER: You can say that in relation to these
18 types of matter which are in (a) to (e) there is
19 a reason why insurers might not want to insure an
20 interference which (inaudible) one which causes an
21 inability to use.

22 MR GAISMAN: I am sorry, my Lord, I lost the middle of
23 your Lordship's point but I'm sure I'm going to agree
24 with it.

25 MR JUSTICE BUTCHER: Insurers might not want to insure (a)

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1 to (e) unless it led to restrictions which led to
 2 a complete inability to use.
 3 LORD JUSTICE FLAUX: The classic example is somebody has
 4 been murdered in the flat above the restaurant, the
 5 police are investigating, they need to do forensic work
 6 within the restaurant, so it is closed. Complete
 7 inability to use. Albeit for a short period of time, as
 8 you say.

9 MR GAISMAN: The same is true, my Lord, it is hard to
 10 believe that if a restaurant had vermin the inspectors
 11 will say, well, you have got to close the Portofino Room
 12 but the rest of the restaurant you can keep open. Not
 13 perhaps how one experiences local authorities, not that
 14 I have much experience, my Lord.

15 Just moving on then, there is a point that my
 16 learned friend Mr Edelman took on {Day2/146:1} in
 17 reliance on the rent clause. That is a bad point and it
 18 is answered in our skeleton at paragraph 161.

19 More substantively, however, there is a further
 20 point. The clause makes clear that inability to use
 21 needs to have been due to restrictions imposed. If I am
 22 right in the submissions I made earlier that this means
 23 mandatory measures, in the sense of measures imposed by
 24 law, the only sort of government measures which would
 25 qualify as relevant restrictions causing an inability to

1 use are compulsory measures in the sense in which
 2 I define them.

3 It follows that all voluntary measures and steps,
 4 including social distancing, for example, staying away
 5 from category 3 businesses, they all fall outside the
 6 clause and they can't be relied upon in the context of
 7 inability to use, even if, as it were, they establish an
 8 inability to use taken on its own. Because it is
 9 restriction posed which cause an inability to use, so
 10 one has to ask oneself what are the restrictions
 11 imposed.

12 Just to make good my point, although I am sure your
 13 Lordships have it, the FCA's case in their particulars
 14 of claim, paragraph 46, is overbroad on all fronts.
 15 First, because it includes all government measures,
 16 including advice. Secondly, and this is how broadly
 17 it is put, if we just look at {A/2/30}, the bottom half
 18 of the page, assuming your Lordships can read that:

19 "The advice, instructions and/or announcements as to
 20 social distancing, self-isolation, lockdown and
 21 restricted travel and activities, staying at home and
 22 home-working given on 16 March [that is before the
 23 regulations] and on many occasions subsequently ...
 24 amounted for all businesses on that date, alternatively
 25 on such subsequent date to be determined by the court,

1 in all cases for which access to or use of the premises
 2 by the owners/employees/customers was material ..."

3 Then each of the following, and we are concerned
 4 with 46.2, inability to use the premises for the
 5 purposes of Hiscox 1 to 4.

6 To the same effect in its skeleton, paragraph 360,
 7 which talks of using the premises for or with its
 8 intended aim or purpose. And the Hiscox interveners'
 9 skeleton, paragraph 125, refers to an inability to use
 10 the premises normally.

11 We submit that this is all far too broad. We have
 12 conceded, as your Lordships will have seen in
 13 paragraph 172 of our skeleton, that a business ordered
 14 to close down by regulations 4 or 5 of the 26 March
 15 regulations, and relevant predecessors, may well be able
 16 to prove an inability to use, assuming it was made out
 17 on the facts. We discussed restaurants, I won't say
 18 ad nauseam, that is a different clause, but let me give
 19 one or two other examples.

20 Business premises ordered to close, which are used
 21 to solicit or fulfil online or mail order businesses,
 22 are clearly being used. The business may be less
 23 active, but they will still be being used. We give the
 24 example in our skeleton at paragraph 185 of a tailor
 25 attending her cutting-room to work on her backlog of

1 orders, assuming tailors still do have backlogs of
 2 orders, or execute new ones that have been solicited by
 3 any of the permitted means. Her shop has been ordered
 4 to close to the public, but it does not follow that she
 5 is unable to use the premises.

6 But the FCA says in paragraph 365 of its skeleton:
 7 "If the government prohibits a non-food shop from
 8 carrying on its business, then there is inability to
 9 use."

10 No, there isn't.
 11 Now schools. A school which is being used for key
 12 workers' children or preparation or delivery of online
 13 assembly or lessons or other interaction with its
 14 regular pupils is clearly being used. The FCA says, in
 15 a submission which does not pay much regard to the
 16 language of the clause, that a school without children
 17 is not much of a school {Day2/148:1}. But the question
 18 is whether it is being used as a school; and if it is
 19 being used to educate vulnerable children or key
 20 workers' children it is being used as a school, or it is
 21 typically being used as a school.

22 Of course it will be a question of fact and degree.
 23 But the FCA's case, where the FCA's case goes wrong is
 24 that it all comes back to the proposition that any
 25 departure from normal use is ipso facto your inability

1 to use the insured premises; and that, with great
2 respect to the FCA and my learned friends, has got to be
3 squashed.

4 It is tedious to go on with this, but one sees the
5 same sort of overstatement in paragraph 366.1 of my
6 learned friend's skeleton argument. If we look or have
7 that on the page, please, it is {1/1/138}. Thank you
8 very much:

9 "Premises cannot be used without people. It is not
10 only a matter of customers. The owner herself or
11 himself, or the business' employees, could not legally
12 attend work."

13 That is an oversimplification if one reads the
14 regulations:

15 They were ordered to 'stay at home' (save for
16 certain businesses)."

17 Quite a lot of businesses. For example, in
18 category 3 and category 5. And anyway, always subject
19 to a reasonable excuse, and so on.

20 It is an illustration of the failure to give any
21 proper recognition to the effect of the significant
22 qualifications and exceptions to regulation 6 and the
23 position of category 5 and category 3 businesses.

24 Anyway, I think I have said enough about inability
25 to use. I want to come back to an important question,

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1 which is -- can we please have bundle B, the public
2 authority clause again. Your Lordships have it open.

3 I see the time, my Lord. Would it be convenient to
4 have the break now or would your Lordship like to go on
5 a bit?

6 LORD JUSTICE FLAUX: Yes, it probably would be sensible to
7 have a break now. My clock says 16 minutes past, so
8 I will say just after 25 past, please.
9 (3.16 pm)

(Short break)

10 (3.26 pm)

11 LORD JUSTICE FLAUX: When you are ready, Mr Gaisman.

12 MR GAISMAN: My Lords, the question I was coming to is
13 whether the lockdown regulations, let's just focus on
14 regulation 6 of 26 March, fall within the public
15 authority clause, your inability to use the insured
16 premises due to restrictions imposed by a public
17 authority. We say the answer to this question is no.

18 Now, the preparatory ground which I have laid has,
19 if I am right, established that the clause contemplates
20 only the insured's inability to use for the insured's
21 purposes. The customer's use and purposes are
22 irrelevant. Can it nonetheless be said, this is another
23 way of putting the question, that the restrictions on
24 the customers creates an inability on the part of the
25

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1 insured to use the premises? Because that is what needs
2 to be shown. The words "due to" ensure that that is the
3 case.

4 Now, this is a question of characterising the
5 relevant "restrictions". The restrictions must be of
6 a character which creates the inability. That must be
7 common ground. They must be restrictions which cause an
8 inability to use. Therefore, moving beyond the common
9 ground, because everything I have said so far must be
10 common ground, they naturally look, in terms of the
11 character of the restrictions, to the position of the
12 insured.

13 If one asks the question, "What is the natural and
14 objectively intended meaning of your inability to use
15 due to restrictions imposed?" the sort of restrictions
16 imposed would be those directed to the insured and
17 directed to its use of the premises. Once again, the
18 context here is all-important. Closure of a restaurant
19 due to food poisoning, closure due to vermin in the
20 kitchen, problems with the drains, Legionnaires' disease
21 in the waterworks, a suicide in the office; all of those
22 are restrictions directed to the insured and the
23 insured's use of the premises.

24 Of course, the effect of all of these is that
25 customers cannot attend. The effect. But that

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1 non-attendance of customers is the result of the
2 inability to use, not the cause.

3 What the clause, we submit, is directed to is
4 a regulation which tells the insured business that it
5 may not use its premises for one of the five stated
6 reasons.

7 By contrast, and maybe we should have them to hand,
8 regulation 6 of 26 March, which is {J/16/4}, regulation
9 6 is not directed to the insured's abilities to use at
10 all, it has a completely different subject matter;
11 regulation 6 is directed at individuals' movements. And
12 requirements in legislation for businesses to close or
13 cease operations are not the same as restrictions on the
14 free movement of the individuals who use them.

15 Nor do they become equivalent, and I am sure this
16 point isn't seriously run, because they are contained in
17 the same statutory instrument as regulations 4 and 5.

18 The clause and the causation exercise which would
19 follow, if it were activated, requires one to ask: what
20 is the ambit of the restrictions imposed, what falls
21 within them and what falls outside them? One cannot
22 lazily answer that question by saying: well, they are
23 all in the same enactment so let's treat them all as
24 a job lot.

25 But better than all of these reasons is there is

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1 a very good reason why the construction which I am
 2 advancing must be correct been. We have all got used to
 3 the idea of a lockdown in the last several months. But
 4 once again I have to ask your Lordships to adopt the
 5 correct perspective of putting yourself back in
 6 a pre-COVID era, when this contract was notionally made.
 7 The very idea that a public authority could impose
 8 a form of modified house arrest, subject to exceptions,
 9 on the entire population, so that people were not
 10 allowed to leave home to visit their favourite shop or
 11 to get their haircut, would have been thought the stuff
 12 of nightmares, completely unthinkable.

13 So the idea that the notional parties would ever
 14 have contemplated that an insured business in the UK
 15 would be reduced to a state of inability to use by
 16 suspension of the entire public's freedom of movement,
 17 something which the FCA concedes in its skeleton was
 18 unprecedented, would have appeared impossible. It would
 19 have appeared ridiculous. Or, to put the point another
 20 way, the FCA's argument makes illegitimate use of
 21 hindsight. Because if one looks, now going back to the
 22 public authority clause itself, it wouldn't cross
 23 anybody's mind that the word "restrictions imposed" to
 24 apply to anything less or anything else than the
 25 premises.

1 MR JUSTICE BUTCHER: Mr Gaisman, I am slightly troubled by
 2 that, by reason in particular of (a) a murder or
 3 suicide. What would be the likely way in which
 4 restrictions were imposed as a result of that? I would
 5 have thought that at least one possibility is that
 6 a cordon would be put round the premises, and there the
 7 restriction may be on people getting to the premises
 8 rather than on the premises. Now I know that overlaps
 9 with the non-damage denial of access cover, but is it
 10 realistic to think that a suicide will lead to
 11 a specific restriction being imposed on the premises?
 12 And if so, under what?

13 MR GAISMAN: My Lord, most obviously in a form of closure of
 14 the building, because it is a crime scene. Perhaps
 15 I speak for myself when I say we are all obsessed with
 16 restaurants, but if you imagine a small solicitor's
 17 office, for example, where somebody has committed
 18 suicide, I mean it is not impossible, of course, that
 19 the place itself, the insured premises itself could be
 20 the crime scene, and the most obvious example in all
 21 cases is a closure of the premises. I am not disputing
 22 that it is not impossible for a police cordon to be put
 23 up and that might engage -- actually, that would be
 24 a case which would be more likely to engage the
 25 non-damage denial of access clause, because the police

1 cordon is the paradigm example. But there are plenty of
 2 cases where a murder or suicide could simply prevent the
 3 use of the premises because the premises have been
 4 closed.

5 Even if it is possible to think of cases such as
 6 your Lordship has put to me, it is much harder to do so
 7 when one gets on to (b), (c), (d) and (e), which
 8 directly engage the health, if I can put it that way --
 9 well, in all four cases, the healthiness and the safety
 10 of the premises. So I would submit it doesn't make much
 11 of a difference.

12 So the paradigm remains, my Lord, and what my
 13 learned friends are saying, they are not talking about
 14 a murder or a suicide, they are saying that the parties
 15 to this case are to be assumed sufficiently to have
 16 contemplated the possibility of lockdown to have
 17 naturally accepted that restrictions caused by -- sorry,
 18 restrictions resulting in an inability to use would
 19 naturally embrace what tendentiously I will call house
 20 arrest. But the truth is that nothing could have been
 21 further from their minds. That is certainly my
 22 submission, my Lord, but then I don't read much science
 23 fiction.

24 My Lord, there are other points too. The FCA has to
 25 argue that regulation 6 -- this is a necessary corollary

1 of the FCA's argument -- as soon as it is passed,
 2 summons into existence a simultaneous inability to use
 3 on the part of all insureds everywhere whose business
 4 relies to any extent on the physical presence of
 5 customers, because a customer confined to his home in
 6 Manchester creates an inability to use in Exeter.

7 I have already made submissions of this type in the
 8 context of a non-damage denial of access clause, and
 9 they will not improve on repetition. But if we are
 10 going to find a restriction imposed causing an inability
 11 to use, let's look at regulation 6 and see where we can
 12 find it. It is on the screen {J/16/4}.

13 Regulation 6 doesn't create an inability to use at
 14 all. Insofar as it mentions businesses, it mentions
 15 businesses that people can use. In particular,
 16 businesses in part 3 of schedule 2. Furthermore,
 17 regulation 6 is subject to various qualifications, the
 18 broad qualification of reasonable excuse and then the
 19 enumerated examples.

20 So you cannot tell by looking at regulation 6
 21 whether an inability to use has arisen, except in the
 22 case of businesses named in part 3 of schedule 2, where
 23 it is clear that no inability to use has arisen by
 24 reason of schedule 6.

25 None of this is surprising, because regulation 6 has

1 nothing to do with inability to use. That is the
 2 purview, and then only to a limited extent, of
 3 regulations 4 and 5.
 4 Even where a business is required to close by
 5 regulations 4 and 5, it is subject to exceptions; mail
 6 order, take-away, online, and so on.
 7 As I have been submitting to your Lordship a little
 8 earlier, that may enable an assured to show an
 9 inability to use or it may not, it all depends on the
 10 facts. But it doesn't matter how hard one stares at
 11 regulation 6, you won't get the answer to that question.
 12 So we have got, as I have already mentioned,
 13 businesses in part 3 of schedule 2, where there are
 14 plainly no restrictions and the explanatory note is
 15 wrong, unless I am. Then there are all the category 5
 16 businesses, which were not required to close.
 17 Now, people could only visit them if they had
 18 a reasonable excuse. So we now seem to have got to
 19 a situation in which inability to use is bound up with
 20 the question of reasonable excuse, to leave home. But
 21 those are two separate questions.
 22 That leads on to the next point. What about
 23 a business where the insured owner can reach out to
 24 people in their homes via Skype or Zoom or telephone or
 25 email? The fact that customers are, let it be assumed,

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1 confined to their homes tells you nothing about whether
 2 those customers can access the insured business or not.
 3 It is just another example of the way in which there
 4 simply is no correlation between the public authority
 5 clause and regulation 6. They are just different things
 6 intended for quite different purposes. And it is --
 7 sorry to repeat myself, but it really is just pure
 8 hindsight to say: ah well, this is what has happened,
 9 customers have been kept away from businesses in their
 10 droves by something that nobody foresaw, therefore it is
 11 a restriction imposed which causes an inability to use.
 12 That is not how the parties to the contract will have
 13 seen it.
 14 That is all I want to say, my Lord, except in
 15 a sense picking up on that last point. Even if I were
 16 wrong so far, and regulation 6 could somehow give rise
 17 to an inability to use, it does not mean that it would.
 18 That is a question of fact. And in many businesses it
 19 would not prevent use, especially if I am right that
 20 "inability to use" means inability to use at all or to
 21 any meaningful extent. Although your Lordships aren't
 22 enamoured of that paraphrase.
 23 So unless your Lordships have any further questions,
 24 I then want to move on to the meaning of "interruption".
 25 For that purpose we need to turn back one page in the

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1 bundle to page 41 of B6 {B/6/14}.
 2 Under the stem, your Lordships know what we mean by
 3 the stem, under the stem to both relevant clauses an
 4 insured needs to show an interruption to its business or
 5 sometimes its activities. Whatever "interruption"
 6 means, nothing less than interruption will do, because
 7 that is the only term used. The term is "interruption",
 8 not disruption and, as we will see, not interference.
 9 Our submission is that interruption requires that
 10 the activities are interrupted, ie that they stop,
 11 subject to one qualification which isn't really
 12 a qualification, and I will come to it in a minute,
 13 partial interruption is not enough, whatever that means.
 14 Indeed, partial interruption is a form of contradiction
 15 in terms.
 16 Now, obviously the true construction of the word
 17 "interruption" in any BI wording depends on the context
 18 in which the word appears. But business interruption is
 19 quite an established field of insurance, and I have to
 20 tell your Lordships that not only has the FCA hitherto
 21 identified no case or textbook in which the term
 22 "interruption" in the BI context has been construed to
 23 mean some sort of partial disruption, but we have found
 24 none.
 25 I shall come back to this point, naturally fearful

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1 of the fact that my learned friend Mr Edelman may
 2 unearth 15 cases in his favour by the time of his reply,
 3 but he hasn't yet.
 4 Now --
 5 LORD JUSTICE FLAUX: That is no doubt, at least in part,
 6 because the classic BI cover is contingent on property
 7 damage.
 8 MR GAISMAN: My Lord, property damage could produce
 9 disruption rather than interruption. Sorry, I --
 10 LORD JUSTICE FLAUX: Yes, I suppose it could, yes. Your
 11 point is that you have not unearthed any case where it
 12 has been suggested that partial disruption amounts to
 13 interruption.
 14 MR GAISMAN: Not yet, my Lord.
 15 MR JUSTICE BUTCHER: The gauntlet has been well and truly
 16 thrown down, Mr Gaisman.
 17 MR GAISMAN: I know, my Lord. That is two hostages to
 18 fortune that I have got out there, which will give me
 19 a sleepless night.
 20 LORD JUSTICE FLAUX: It will serve you right if Mr Edelman
 21 comes back with something.
 22 MR GAISMAN: I'm always anxious to give Mr Edelman
 23 professional satisfaction where I can.
 24 My Lords, Hiscox's is not an unduly onerous
 25 construction for two reasons. It is said against me

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1 that it is, that is why I am making this point.
 2 First, one must remember that many, if not most
 3 interruptions are short-term affairs, especially the
 4 sort of interruptions resulting from the clauses under
 5 consideration in this case. Of course they can be
 6 longer, but it is important not to allow exceptional
 7 circumstances such as obtain at the moment in the
 8 present emergency unduly to colour your Lordships'
 9 thinking.
 10 Secondly, and this is the qualification I made
 11 earlier, this is premises-based cover. That is clear
 12 from I think every clause in the wordings, and from the
 13 NDDA and public authority clauses in particular.
 14 Hiscox does not dispute that where an insured has
 15 two separate premises, the cessation required is only
 16 a cessation at one of them, not both. Just as the
 17 inability to use or denial of access refers to these
 18 things happening at an individual premises.
 19 So in that sense, and in that sense only, but it is
 20 really an exception, partial interruption is covered.
 21 Where, however, you have a business, and let's treat
 22 that as our paradigm, which operates from one location,
 23 the requirement is for that business to be interrupted,
 24 ie to stop.
 25 Now, as I say, we have not been able to find, just

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1 to dig myself a little deeper into this whole, any
 2 English case law or textbook guidance on this question.
 3 Perhaps the point has been regarded as obvious. Nor
 4 have we found anything useful in Australia or
 5 New Zealand. However, the position in the US and Canada
 6 is a little less barren and the position appears to be
 7 uniform.
 8 Now, again it helps to separate out the individual
 9 Hiscox strand from the FCA's omnibus case against all
 10 insurers, because they tie us in with policies involving
 11 interference, which ours doesn't, and the process of
 12 isolating the FCA's case against my clients is a helpful
 13 one.
 14 What it reveals is that the case against us is far
 15 too broad. To demonstrate that this is so, it is hardly
 16 necessary to do more than to see what the FCA is saying
 17 about what a business interruption is against Hiscox.
 18 The key criterion, according to the FCA, for
 19 interruption is the requirement for "some operational
 20 impact"; that is the skeleton, paragraphs 159 to 160.
 21 This proposition is said to derive from The Silver
 22 Cloud, an authority which says no such thing.
 23 The FCA also says that a business is interrupted if
 24 it is not able to carry out its operations in the manner
 25 it previously had and would ordinarily have been

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1 carrying out those operations, without contravening the
 2 government's advice, et cetera; that is skeleton
 3 paragraph 163. An interruption occurs where "any aspect
 4 of the normal operations of the business" is, my choice
 5 of verb, impeded; {Day2/155:9} to line 10.
 6 And again, requiring a business to keep two metres
 7 distancing between customers and employees would
 8 ordinarily be sufficient to amount to an interruption to
 9 the insured business' activities. It impedes access to
 10 and by customers to an extent that has a major
 11 operational impact, interrupting the normal functioning
 12 of the business; paragraph 163, {Day2/154:1}.
 13 So not only has Waitrose suffered an inability to
 14 use its premises, but it has also had its business
 15 interrupted, and so has every shop in the country
 16 permitted to stay open with a long queue of customers.
 17 Of course, what has really happened is that the
 18 customers have had their days interrupted by having to
 19 queue, which is very different from saying the
 20 businesses have had their activities interrupted.
 21 My Lords, every element of this case is wrong and we
 22 have explained why in our skeleton. The FCA criticises
 23 our position as extreme; that is its choice of
 24 adjective, {Day2/155:1}. However, with respect, the
 25 FCA's case is far more extreme linguistically. It

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1 involves substituting a whole range of different
 2 concepts from the simple word used, so that any change
 3 to normal operations constitutes an interruption. The
 4 test that the FCA sets would be passed even in
 5 circumstances where the activities carry on busily. And
 6 we say that interruption requires much more than just
 7 some sort of change in the way things are done.
 8 Now, I have already answered my Lord
 9 Lord Justice Butcher's point on the loss of attraction
 10 cover. That is in the wrong place, it doesn't deal with
 11 interruption at all, the point proves too much; see our
 12 skeleton at 285.
 13 I should also pick up a point made by my Lord
 14 Lord Justice Flaux on {Day2/153:21} because
 15 your Lordship on this occasion cited the specified
 16 customer and supplier provisions in some of the Hiscox
 17 wordings, for example on page 41. If your Lordship has
 18 the customers and suppliers wording there, {B/6/41},
 19 what your Lordship said was:
 20 "So if the business has ten specified customers, one
 21 of whom has damage at his premises, so you can only deal
 22 with nine of them, unless 'interruption to your
 23 activities' means disruption as opposed to complete
 24 cessation, that cover is completely meaningless."
 25 With great respect, my Lord, if I'm allowed to

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1 I join issue with my Lord Lord Justice Flaux. First,
2 and obviously, a specified supplier -- I am sure we can
3 all agree on this -- might very easily interrupt
4 a business completely by failing to supply a vital
5 component.

6 As regards a specified customer, or indeed an
7 unspecified customer, my Lord Lord Justice Flaux's
8 example makes two assumptions of fact, the first express
9 or the second perhaps not.

10 The first assumption is that the insured has a large
11 number of customers. That might or might not be the
12 case. But the second assumption is that damage at the
13 premises of one of the customers could not cause an
14 interruption to the insured's business.

15 But with great respect, my Lord, it could. For
16 example, a small IT company has a big contract which
17 means that all its staff are at present engaged in
18 providing services installing an IT network at
19 a particular customer's premises. It is not the only
20 customer, because it has work in the diary for other
21 customers, but for the time being its staff are taken up
22 by a large job installing IT at the premises of
23 a customer. There is then a fire at the premises of the
24 customer and the work has to stop. It is easily to be
25 understood, on the right facts, it all depends on the

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1 facts, that the customer might terminate or suspend the
2 contract and leave the insured without business for
3 a while.

4 Or to take another example, a manufacturing business
5 manufactures a large engine for a customer, even if only
6 one of its customers. The inability of that customer to
7 take delivery of that engine might cause a cessation of
8 the business activities if, as a result, the engine had
9 to remain occupying, as it were, the only berth in the
10 shipyard, if I can put it that way, and thereby brought
11 the business to a close.

12 In other words, there is nothing in these clauses
13 which drives one to the conclusion that the word
14 "interruption" should be given an eccentric, as I submit
15 it is, meaning.

16 But also if I may just persevere with my Lord
17 Lord Justice Flaux's example, in a sense it proves too
18 much, because the implication is that any effect on the
19 insured's business caused by damage at the premises of
20 a specified customer qualifies as interruption. But no
21 case has anywhere ever held this. Or to put the point
22 another way round, my Lord's point on Day 2 leaves open
23 the question: what is actually meant by an
24 "interruption" if not some cessation, it may be
25 a temporary cessation, in accordance with the natural

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1 meaning of the word?

2 The FCA --

3 LORD JUSTICE FLAUX: Mr Gaisman, you say that "inability to
4 use" means unable to use or not able to use to any
5 meaningful extent. What about that for "interruption";
6 stopped or not able to go on to any meaningful extent?

7 MR GAISMAN: My Lord, that qualification is really not an
8 available meaning of the use of the word "interruption".
9 "Interruption" means, both etymologically and in the
10 better primary dictionary meanings, it means a stop.
11 That is the natural meaning. If people wanted to
12 introduce that concept, they could have had
13 "interference", or some yet further point such as
14 "significant interference".

15 It is important to recognise, my Lord, that
16 "inability to use" and "interruption" are separate
17 concepts. As we say in our skeleton, even if you can
18 show as an insured that your premises can't be used, if
19 you are off on a 6-month world cruise your business
20 won't have sustained an interruption, because you are
21 not actually running the business at the time. They are
22 separate and cumulative concepts, and it is important,
23 not least because the loss has to be solely and directly
24 caused by the interruption. It may be more than that,
25 but certainly by the interruption. So these words --

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1 LORD JUSTICE FLAUX: You would say that an example, going
2 back to your example of the lady tailor, she uses her
3 premises during the lockdown to service existing
4 customers and gets a lot more new customers through
5 online orders, and in an example such as that you could
6 not say that there had been an interruption in her
7 activities, irrespective of whether you could say there
8 was an inability to use the insured premises. But they
9 are two separate questions, aren't they?

10 MR GAISMAN: They certainly are, my Lord. And one can come
11 even closer to home. Opinions are divided about whether
12 or not the chambers in which I am sitting are chambers
13 which I have been unable to use. That is one of the
14 questions which divides the parties. But nobody
15 involved in this test case, and very few people engaged
16 in category 5, would find it possible seriously to
17 suggest -- perhaps I shouldn't talk broadly about
18 category 5, I will come on to it. Let's just talk about
19 solicitors and barristers, or financial advisers or
20 a whole range of professional people, the idea that
21 their businesses have been interrupted can't be
22 seriously entertained. We have had to adapt, we have
23 had to get used to working at home and dealing with the
24 sound of the Hoover in the background, but the idea that
25 our business has been interrupted is absurd,

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1 irrespective of whether I am right or wrong on inability
2 to use.
3 I have spent perhaps too long, in the way that one
4 does, on my Lord Lord Justice Flaux's case in point, but
5 the final, perhaps shamelessly defensive, point that
6 I make is that if it is a good point that my Lord put to
7 Mr Edelman, it is only a good point in those minority of
8 covers where there is either, to take my Lord
9 Mr Justice Butcher's point, a loss of attraction or
10 my Lord Lord Justice Flaux's point, the specified
11 customers.
12 Okay. Now, I have addressed your Lordships on the
13 natural etymological dictionary meaning of the term.
14 The parties trade not very enlightening examples
15 involving production lines. This is a question of fact,
16 and each of us trading examples at the extreme doesn't
17 really help. But I would certainly say that just
18 because one of your 3 or 5 or 8 or 2 production lines is
19 down and there is some operational impact, that doesn't
20 prove an interruption.
21 Furthermore, as is obvious, glaringly obvious
22 actually, the FCA is trying to broaden the Hiscox cover
23 to include interference.
24 Now, I am not disobeying my own rule about
25 construing contracts by reference to what is not in

1 them, as I will explain, but some of the policies in
2 this case provide cover for interruption and
3 interference. Hiscox's do not. It would be completely
4 incoherent for this court, if I may say so with great
5 respect, to write a judgment, unless compelled to do so
6 by other indications in the wordings, of which there are
7 none, which ignore that important difference.
8 Now my Lord Mr Edelman submitted on Day 2 at
9 page 155, {Day2/155:1} that interference is merely
10 "marginally", that was the word he used, a marginally
11 wider term than "interruption". That is quite wrong.
12 But the FCA did not explain how the word "interference",
13 on its case, is even marginally wider, since the
14 criterion, some operational impact, that he puts forward
15 is the same for both.
16 Let's be straightforward about this. The FCA is
17 actually treating the two words as meaning the same
18 thing, and how can that be right? They are different
19 words conveying different concepts. Nor, as I said
20 a minute ago, am I disobeying my own injunction not to
21 construe the contract by reference to what isn't in it.
22 As we say in our skeleton at paragraph 34, where
23 a particular word is used in a contract and it has
24 a settled meaning, if one party seeks to give that word
25 a quite different meaning, it is legitimate for the

1 other party to point out that there exists a readily
2 available English word which the parties could have used
3 had they wished to effect that meaning but did not.
4 Nothing wrong with that at all.
5 Next, my Lord, the Canadian authorities which we
6 cite in our skeleton argument in paragraph 287, at
7 {I/13/96}, are both, if I may respectfully say so,
8 obviously right.
9 My learned friend dealt with the first case in
10 paragraph 287.1, EFP Holdings, by saying that he could
11 live with what was said in that case by
12 Mr Justice Pitfield. He read out the middle sentence in
13 the quotation in italics in that paragraph:
14 "Interruption contemplates a break in the continuity
15 of the business."
16 Well, if he reads that as consistent with his
17 submission, we will have to agree differ. But let's go
18 on. That is interruption:
19 "Interference contemplates a lesser event which may
20 not interrupt the business but impedes or interferes
21 with the profit-making capability of the business,
22 resulting in a diminution in gross profit."
23 It is quite obvious that this is not an authority
24 which supports Mr Edelman's case. Even he did not
25 attempt to argue that the next authority, the Le Treport

1 Wedding case, was an authority in his favour. In that
2 case, as Mr Justice Gray says in paragraph 253, quoted
3 in paragraph 287.3, it means that the business must
4 cease operating.
5 The best that the FCA can say about that is that the
6 decision is under appeal. With respect, so what? That
7 is of no more significance than the apparent
8 significance ascribed to the fact that the
9 Orient-Express case settled before the Court of Appeal.
10 May I just have a moment.
11 We have, since drafting the skeleton argument, done
12 some digging around in the United States and at
13 {K/195.1/1} we cite a US textbook, Couch on Insurance,
14 paragraph 167.11. I am going to take this quite
15 shortly. It is the second paragraph beginning:
16 "Depending on the language of a policy, a business
17 'interruption' or 'suspension' triggering coverage
18 typically involves a total cessation of business, not
19 merely a slow-down or reduction in operations."
20 Then some examples are given. I don't want to
21 discourage your Lordships from reading that, perhaps you
22 would take a moment to read the rest of the paragraph.
23 (Pause)
24 Just two cases, my Lords, which illustrate the
25 point. I will introduce these to your Lordships, but

1 I will give your Lordships the references. A case
 2 called *Keetch v Mutual Insurance Company*, a decision of
 3 the Court of Appeals in Washington State {K/2/78.1}.
 4 My Lords, that is a 1992 decision. It was a claim by
 5 a hotel for losses resulting from a decrease in guests
 6 and a reduction in the quality of service caused by the
 7 volcanic eruption of Mount St Helens. The hotel was
 8 buried in six inches of ash but boldly remained open,
 9 and the policy had a loss of earnings endorsement
 10 covering loss of earnings resulting directly from
 11 necessary interruption of business caused by the perils
 12 insured against.

13 The insured was held not entitled to recover because
 14 there was no interruption, and after a review of
 15 authority the court concluded that the purpose of
 16 business interruption insurance is to indemnify for the
 17 loss due to inability to continue to use insured
 18 premises. Here the insured did not suspend its business
 19 activity, its business was not interrupted as provided
 20 for in the loss of earnings endorsement.

21 In the later case a few years later, in 1998,
 22 *Quality Oilfield v Michigan Mutual Insurance* {K/2/86.1}
 23 the Court of Appeal of Texas, the insured manufacturer
 24 of oilfield equipment suffered a burglary of engineering
 25 drawings, computer disks and design information. It

1 claimed business interruption losses on the basis that
 2 the items were the centre of its operations and caused
 3 an interruption of normal activity. The policy provided
 4 cover for loss resulting directly from the necessary
 5 interruption of business caused by damage to or
 6 destruction of real or personal property. Coverage was
 7 denied, by the court, on the basis that the operations
 8 were not suspended, and the court held that after
 9 considering the policy as a whole, and persuasive
 10 authority from other jurisdictions, "we find that
 11 'interruption of business' is an unambiguous term
 12 meaning cessation or suspension of business."

13 I should say in both cases, my Lord, support for the
 14 court's conclusions was provided in the form of
 15 a mitigation clause which required the insured to
 16 mitigate by a "complete or partial resumption of
 17 operation of the policy". However, the presence of that
 18 clause in each case only buttressed the conclusion which
 19 the court reached anyway on the understood meaning, in
 20 the business interruption context, of the word
 21 "interruption".

22 My Lords, I return to the FCA's proposition that
 23 interruption requires some operational impact. Of
 24 course it does. That is paragraph 159. But that
 25 proposition is of no assistance to the FCA unless it is

1 to be read as something far more ambitious, which is
 2 that interruption only requires some operational impact.

3 I have already said, but I am going to say it again,
 4 the authority cited in support of that proposition is
 5 *The Silver Cloud* and I am not going to waste time
 6 looking for something in an authority which isn't there.

7 My Lord, a business that can carry on in part has in
 8 principle, and of course it will depend on the facts,
 9 not been interrupted, because the business activities
 10 have not ceased. Therefore, although the example cited
 11 in the FCA's skeleton at paragraph 165, of the factory
 12 with three production lines, two of which are put out of
 13 action, is a clear case of non-interruption, unless the
 14 two production lines being put out of action means that
 15 the business has to stop. There is nothing remarkable
 16 about that at all.

17 Of course it is a question of fact. Of course there
 18 will be cases near the borderline, that is always
 19 possible. But the test which the fact-finder must apply
 20 in each case is: did the business activities stop? In
 21 principle, therefore, and although one cannot exclude
 22 all cases, the only businesses which are likely to be
 23 able generally to prove that they were interrupted are
 24 those which were ordered to close or to cease business
 25 by what became regulations 4 and 5 of the 26 March

1 regulations.

2 Even then, and given the substantial exceptions
 3 within those businesses, the tailor, the take-away, the
 4 online mail order exceptions, there is no doubt that
 5 many businesses falling within regulations 4 and 5 will
 6 have been able to carry on, and their businesses were
 7 therefore not interrupted.

8 But again, my Lord, consistent with its case on
 9 "interruption" meaning mere operational impact, the FCA
 10 argues that these businesses too were interrupted
 11 unless, prior to the regulations, they were wholly
 12 take-away, wholly online or wholly mail order. Given
 13 the time I won't take your Lordship to paragraph 47 of
 14 the particulars of claim but that is what is said.

15 This is once more, with respect to my learned
 16 friend, obviously wrong, and produces easily imagined
 17 results which are unable as a matter of ordinary
 18 language, such as, for example, the Chinese take-away
 19 with two tables.

20 But can I just come back briefly to category 5
 21 businesses, which I mentioned earlier. This is
 22 a category in which Hiscox is particularly interested;
 23 65% of our insureds are in category 5.

24 These are businesses which were not ordered to close
 25 or to cease; they were permitted to remain open and

1 active. As your Lordships know they include
 2 accountants, lawyers, consultants, advisers, lots of
 3 other different types of professional. They also are
 4 people who, clearly, found it easiest to work from home.
 5 Insofar as they did so, their businesses were in
 6 principle not interrupted. Insofar as they could not
 7 reasonably work at home, they didn't have to; they could
 8 leave home and go anywhere where their work took them,
 9 where that work could not reasonably be done at home.
 10 It is very important to appreciate what regulation
 11 6(2)(a) says about this. But whether or not they left
 12 home, the full panoply of modern communication tools was
 13 available to them. Nonetheless, many category 5
 14 businesses have submitted claims.

15 Now as we said, if we could just get on the screen
 16 our skeleton argument, paragraph 27, {1/13/11}. I think
 17 I mean paragraph 28. I mean paragraph 28. Can we just
 18 move the page up a little. Thank you very much.

19 Your Lordships will be familiar with this paragraph,
 20 it came comfortingly early on in our skeleton argument,
 21 but it is very, very important. We have made
 22 a complaint here that even though they know who our
 23 insureds are, the one worked example that the FCA offers
 24 against Hiscox is of a clothes shop with no online
 25 business, as if that is somehow typical of our

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1 clientele, and it isn't.
 2 There is nothing in its obsession with restaurants
 3 with no take-aways or shops with no online facilities,
 4 there is no sign in the FCA's skeleton of any
 5 acknowledgment of what we all know happened for many, if
 6 not most, category 5 businesses. The fact is that for
 7 many insureds in category 5 life carried on, maybe not
 8 as normal, and with adaptations, with increased use of
 9 online facilities and so on, but I can't resist saying
 10 once that the fact that we are holding this test case as
 11 smoothly as we are is an evident demonstration that none
 12 of our businesses have been interrupted.

13 The FCA's counsel disagrees with all of this and at
 14 one point said --

15 LORD JUSTICE FLAUX: It is the interruption to your
 16 activities. The opening words of the provision talk
 17 about an interruption to your activities caused by, in
 18 this instance the restrictions, et cetera, leading to an
 19 inability to use the insured premises. And the short
 20 point is, in relation to category 5, whatever the impact
 21 was on the premises, you say there wasn't an
 22 interruption of their activities.

23 MR GAISMAN: There is most unlikely to have been, my Lord.

24 LORD JUSTICE FLAUX: Sorry, say that again.

25 MR GAISMAN: There is most unlikely to have been. I don't

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1 want to commit myself to --

2 LORD JUSTICE FLAUX: I follow. I follow.

3 MR GAISMAN: -- an absolute proposition, because there will
 4 be findings of fact, and I don't want to be theological
 5 about this.

6 By contrast, the FCA's counsel at one stage was
 7 persuaded to say this about category 5, on {Day2/156:1}:
 8 "I would invite Hiscox perhaps to reflect on the
 9 extremity of the position they have adopted, because if
 10 there is this restriction on their cover through the
 11 word 'interruption' it really undermines the commercial
 12 purpose of it, and one wonders what cover it would
 13 actually provide for any category 5 business because
 14 they could never suffer an interruption, as Hiscox would
 15 have it, because some work could always be done from
 16 another location."

17 My Lord, that is not a good point. A fire at
 18 a solicitor's office destroying its computer systems and
 19 backups could easily give rise to an interruption.
 20 A police order to evacuate an office immediately due to
 21 some emergency could do so. These are, of course,
 22 unlikely events. But professional businesses, generally
 23 advised, as in these cases, by professional insurance
 24 brokers, insure against those remote contingencies
 25 against which they wish to insure.

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1 Just coming back to a point that my Lord
 2 Mr Justice Butcher made to me a minute ago, interruption
 3 too is a question of fact. Although it is a different
 4 question from loss of use, there may come a point, on
 5 the facts, where, to use the same adjectives as I used
 6 the, business activity is so nugatory or vestigial that
 7 to all practical intents and purposes it ceases.

8 It is not going to be the same test as the inability
 9 to use test, and there still has to be, and the
 10 fact-finder must direct herself or himself directly,
 11 there still has to be the test of a cessation of
 12 activities. A break. But I am not being absolutist
 13 about this. Who knows what the facts are --

14 MR JUSTICE BUTCHER: You seem to have slightly warmed to
 15 I think the point which I was putting to you last time,
 16 at which point you totally disagreed with it.

17 MR GAISMAN: My Lord, apart from the fact that I hadn't come
 18 to the relevant position in my notes, I thought what
 19 your Lordship was putting to me was that it was the same
 20 sort of question as would arise in the context of
 21 inability to use.

22 MR JUSTICE BUTCHER: What I was trying to put to you was
 23 that there must be an equivalent to the inability to use
 24 if the use is not meaningful, and I was thinking to
 25 myself that there might be a similar qualification to

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1 interruption .
 2 MR GAISMAN: Similar in an adjectival sense, if I can put it
 3 that way, but it raises a different question of fact and
 4 it in no way follows from an inability to use that there
 5 will be an interruption, assuming my vestigial
 6 qualification to both, because they are separate
 7 questions. And actually, I think I do maintain that in
 8 the case of interruption it is a slightly brighter line
 9 test, because inability to use is just a sliding scale,
 10 whereas there needs to be a threshold crossed in the
 11 case of interruption, which I submit is, in a sense, an
 12 easier thing to recognise but therefore, conversely,
 13 a harder thing for the insured to prove.

14 So I am not really doing any more than saying yes,
 15 it is a question of fact, and I am not being theological
 16 about it, but the legal test required is a cessation of
 17 business.

18 Now, my Lord, can we just --
 19 LORD JUSTICE FLAUX: I know we are not looking at issues of
 20 fact, but I just want to try and get in my own mind what
 21 sort of situation we might be talking about then.

22 Taking your example of a small firm of solicitors .
 23 There is an office fire that destroys all the computers
 24 and all the records, but the solicitor carries around in
 25 his head the addresses of all his clients. So he writes

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1 all his clients a letter over the week after the fire in
 2 which he says, "Terrible sorry, I am afraid there has
 3 been a fire. We can't service your case at the moment.
 4 But the moment that we have sorted out all the problems
 5 from the fire we will be back in touch".

6 In one sense the sending of those letters is part of
 7 his activities. But in another sense I think he would
 8 say in that example that his activities have been
 9 interrupted and what he is doing really is just
 10 a vestigial as it were holding the line until he can
 11 actually commence his activities again.

12 MR GAISMAN: There is very good reason why your Lordship is
 13 almost certainly right, because the solicitor who
 14 charged for those letters would be a bold solicitor
 15 indeed.

16 I see that we are getting close to the end of today,
 17 but I haven't got much more ground to cover. I will
 18 take a little time, but probably not very much time,
 19 tomorrow morning. But can I just get as far as I can
 20 this evening. I am within my agreed allocation as
 21 generously extended by grants from the likes of
 22 Mr Howard and Mr Kealey.

23 LORD JUSTICE FLAUX: Before you do, Mr Gaisman, just so
 24 I know, what time tomorrow morning is it proposed to
 25 resume?

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1 MR JUSTICE BUTCHER: You are on mute, Mr Gaisman.

2 MR GAISMAN: Thank you. I was going to ask either tomorrow
 3 morning or Wednesday morning for an extra half an hour
 4 on the basis that there were two extra half hours in the
 5 FCA interveners' time last week.

6 LORD JUSTICE FLAUX: Subject to my Lord I am happy to start
 7 at 10.00 am tomorrow.

8 MR GAISMAN: My Lord, can I turn to paragraph 381 of the
 9 FCA's skeleton on page 142. {1/1/142} The trouble with
 10 this paragraph is that it indicates the sort of cast of
 11 mind with which the authors of this skeleton are
 12 approaching these sort of cases, including category 5
 13 cases.

14 I think I can pick it up in line 4:

15 "Hiscox raises the argument ..."

16 LORD JUSTICE FLAUX: It has not come up yet, Mr Gaisman.

17 MR GAISMAN: Right. {1/1/142}

18 Could we just make that a bit bigger, please, and
 19 I am starting in line 4:

20 "Hiscox raises the argument that if work could
 21 reasonably be done at home then the insured's business
 22 did not sustain an interruption. This is wrong. The
 23 fact that an insured may be able to restart some of its
 24 activities from another location does not mean that its
 25 normal business or business activities have not been

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1 interrupted; it simply means that the insured has taken
 2 efforts to minimise losses, as required by the policies
 3 (and if it has increased cost of working cover such
 4 increased costs will be recoverable). Once there has
 5 been an interruption there is an indemnity for the
 6 period during which the business is affected."

7 I will come back to that:

8 "Any small contributions made by home-working to
 9 gross profit will of course be taken into account in
 10 a quantum calculation."

11 Now, my Lord, there are several examples in that
 12 short passage of tendentiousness, begging the question,
 13 slanting the case in the most unfavourable way to the
 14 facts that we all know have been the typical experience
 15 of category 5 businesses who are being referred in this
 16 paragraph. The use of the word "restart" begs the
 17 question. We have obviously got far too broad
 18 a definition in terms of normal business activities
 19 having been interrupted. It is assumed that any
 20 contributions from home-working are small contributions.
 21 What is the justification for that. And I will come
 22 back, because in a sense that is a most serious fallacy
 23 of all, to the sentence:

24 "Once there has been an interruption there is an
 25 indemnity for the period during which the business is

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1 affected ."
 2 But also the word "restart" doesn't only beg the
 3 question, but it also implies that a professional who
 4 chooses to spend a working day rather than a weekend day
 5 carrying files, computers, equipment, whatever tools of
 6 the trade he needs, in his car from his office to his
 7 home, that such a person has suffered a business
 8 interruption. That is extremely unlikely.

9 Nor to pick up the other point which we get in
 10 paragraph 380 {I/1/141} ... I think it is 380. There is
 11 a suggestion that our construction punishes those
 12 assureds who are adaptable enough to avoid or to
 13 minimise any interruption.

14 I am just trying to find the quotation. It is the
 15 top of the same page we are looking at:

16 "Construing interruption to require a full cessation
 17 would punish actions taken by a policyholder."

18 Now my learned friend, as I understand it, concedes
 19 in the passage that I have read, and also on
 20 {Day2/147:1} that the costs of adaptation would
 21 ordinarily be recoverable under the increased costs of
 22 working. He is right. But then he says, so you gain
 23 the costs of setting up your take-away service at the
 24 price of losing your business interruption cover.

25 Even though it is 26 minutes past 4 it will be

1 immediately obvious that my learned friend assuming in
 2 the FCA's favour the very question we are debating,
 3 which is whether he has lost anything at all; what is
 4 the scope of the cover in the first place and does it
 5 cover any departure from normal working.

6 My Lords, in the time available can I make one more
 7 point, but it is an important point, and if it takes me
 8 five minutes not three will that inconvenience your
 9 Lordships? I hope not.

10 Can we go back to page 41 in the Hiscox wordings and
 11 the step. It is the words "solely and directly".
 12 {B/6/41}. Your Lordship is very familiar with where
 13 these sit. But there is an issue between the parties,
 14 and I am not on this issue, I am on a different point.

15 The issue between the parties is what words "solely
 16 and directly" qualifies. Assume I am wrong about that.
 17 One thing that is quite clear is that the interruption
 18 has to be the sole and direct cause of the loss. Nobody
 19 could argue to the contrary. So concurrent proximate
 20 causes of loss are excluded.

21 Now the rhetorical question which the FCA poses in
 22 its skeleton at paragraph 394 -- it is quite generally
 23 put -- did losses result solely and directly from the
 24 interruption. In general terms of course they did, it
 25 says.

1 My Lords, as a general proposition nothing could be
 2 less self-evident.

3 Take a category 5 business which relocates to
 4 home-working. Let it be assumed in my learned friend's
 5 favour that the adaptation is so complicated and
 6 difficult that on the facts there is an interruption,
 7 let's say for a week, and then the business is up and
 8 running again. Working from home is not ideal and
 9 general COVID effects reduce the amount of business, and
 10 the turnover, but the business activities have resumed.
 11 From the date of the resumption it would be impossible
 12 to say that the interruption continues.

13 In the passage I have just read your Lordship from
 14 paragraph 381 the FCA says once there has been an
 15 interruption there is an indemnity for the period during
 16 which the business is affected.

17 As a description of the indemnity period that is
 18 unexceptionable. But the losses, as we see, have to be
 19 solely caused by the interruption. That is what the
 20 clause says.

21 In the case of the category 5 business that has
 22 painfully relocated, it is highly unlikely that once it
 23 is up and running again the loss, the diminution in
 24 profits that it experiences as a result of general
 25 COVID-related activities, will have been solely caused

1 by the interruption, or indeed caused by the
 2 interruption at all.

3 Of course, if there is some specific business
 4 opportunity which has come and gone specifically and
 5 solely as a result of the interruption, that is
 6 different. But in the ordinary case where you have
 7 a short period of interruption and then you carry on as
 8 best you can, working from home, clearly carrying on
 9 working, and your business is affected because
 10 everybody's business is affected, economic activity is
 11 down, how can that be said, that loss, after the
 12 resumption, to be caused solely or indeed at all by the
 13 interruption. The answer is that it can't.

14 If we apply this sort of example -- and this is my
 15 last point -- to the FCA's paragraph 394.3 {I/1/146},
 16 please, paragraph 394.3, my learned friends say things
 17 like in the middle of the paragraph:

18 "What is left if one takes away the interruption to
 19 the business (not the cause of the interruption; the
 20 interruption itself). The answer is, nothing or very
 21 little."

22 Then it goes on:

23 "... the fall in economic activity is not
 24 a separate cause. It was caused by the interruption in
 25 activities to the business ..."

1 And you can read to the end of the paragraph.
 2 In the instance I have given, which will be typical
 3 of a lot of businesses, the loss of a resumption will
 4 not have been caused solely by the interruption but by
 5 other broader COVID-related factors.
 6 The truth is that once one understands what is being
 7 said by the FCA -- this is part of its jackpot
 8 argument -- once it gets its fruits in a row on the
 9 fruit machine the fruit machine pays out a jackpot, but
 10 this is in a sense only an exemplification of my point
 11 that you have to look and see what the clause requires.
 12 I have talked about pipelines, and it is time for me
 13 to stop making submissions to your Lordship, but the
 14 last pipeline after pipeline (d) is that the
 15 interruption must be the sole cause of the loss. And in
 16 the example I have given, and many similar examples,
 17 that will simply not be the case. But the FCA seems to
 18 think it axiomatically follows. The reverse is true.
 19 I am sorry to have taken a bit longer than I should
 20 have done.
 21 LORD JUSTICE FLAUX: Very well. Not to worry, Mr Gaisman.
 22 We will break there until 10.00 am tomorrow morning,
 23 please. Thank you.
 24 (4.33 pm)
 25 (The hearing adjourned until 10.00 am on Tuesday,

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1 28 July 2020)
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