D3 and D5 – Note on new material introduced in the FCA's reply

1. In reply (Day 8), Mr Edelman QC referred for the first time to an article written by Lord Hoffmann, which the FCA added to the bundle **{J/157/1}** on Day 5 (*i.e.* after Gavin Kealey QC's causation submissions on Day 4).

2. Referring to a two-stage process (*viz.* first, whether a putative cause amounts to a 'cause in fact' and secondly, if it does, whether it counts as a cause in law), Lord Hoffmann wrote (extra-judicially): "*But no judge in fact adopts such a two-stage test.*" **{J/157.1/3}**

3. Lord Nicholls in ***Kuwait Airways*** at [69] – [70] **{J/86/208}** referred to "*the commonly accepted approach*" being a "*two-fold inquiry*", the first being "*widely undertaken as a simple 'but for' test*". He identified the application of the first stage of the two-fold inquiry in cases of conversion as the matter under consideration in that case. Lord Hoffmann sat on the Appellate Committee and agreed with Lord Nicholls – [125] **{J/86/223}**.

4. In his article, Lord Hoffmann's contention was that, instead of speaking of proof of causation, it would be better to speak of "*the 'causal requirements' of a legal rule."* **{J/157.1/8}**. He acknowledged that "… *the courts, following common usage, have normally given a standard meaning to a requirement that X must have 'caused' Y, such as the 'but for' test*, …*"* where "*[d]epartures from the standard case have to be explained*" **{J/157.1/8}**.

5. Lord Hoffmann's acknowledgment is consistent with ***Galoo*** **{K/80.1}**, in which the full passage at 1369B – 1375B **{K/80.1/10}** should be read. On the footing that the 'but for' test was passed (see 1369G), the plaintiff was contending that this was sufficient for the purposes of legal causation. On its own, the test was considered by the Court of Appeal (and in the Australian authorities to which it referred) to be insufficient. In addition, common sense had to be applied to answer the question whether the 'but for' cause (see 1369G) was the effective cause and, therefore, the cause in law (see 1375B). The court was essentially doing what Lord Hoffmann suggested in his article that courts do not do. ***Galoo*** is no authority for the proposition that common sense can displace the necessity of satisfying the but for test.

6. The same applies to the suggestion that Lord Hoffmann's analysis supports the proposition that, because of the section 55 test of proximate cause, the 'but for' test does not apply. The insured peril cannot be a proximate cause (*i.e.* a dominant, effective or operative cause) if, but for the peril, the same interruption/interference with the business would have been suffered – Joint Skeleton on Causation at paras. 23-24 **{I/6/18}**.