

OPUS2

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

Day SC3

November 18, 2020

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Phone: +44 (0)20 3008 5900

Email: transcripts@opus2.com

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

Wednesday, 18 November 2020

(10.30 am)
Submissions by MR EDELMAN (continued)
LORD REED: Welcome to the Supreme Court of the United Kingdom. This is the third day of the hearing of the appeal in the proceedings brought by the Financial Conduct Authority against a number of insurance companies in order to decide what liabilities, if any, they may be under to businesses who took out business interruption insurance policies and suffered business interruption as a result of the COVID pandemic.

Today we'll be continuing to hear the submissions on behalf of the Financial Conduct Authority, so I will turn now to their counsel Mr Colin Edelman QC. Mr Edelman.

MR EDELMAN: My Lord, I am grateful. Postscripts from yesterday. Firstly, the defence cost cases. We've now added Travelers v XYZ to the bundle, you'll find that in the new bundle K at page 1 {K/1/1} and there's a short passage at paragraph 13 in the judgment of my Lord Lord Briggs, I should, of course, have remembered that case because I was in it. That was a particular case about insured and uninsured claims. And the Zurich v IEG was in the

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bundle. It's bundle E, tab 21, page 473 {E/21/473}. But the relevant passages are paragraphs 36 to 38 Lord Mance, and 176 to 177 Lord Sumption. I don't need to take you to them, but just to make it clear that the only reason I raised that point was in answer to Mr Kealey's submission that the "but for" test is essential in ascertaining whether the insured has suffered loss by reason of the insured contingency and he said it is to prevent indemnity if -- the effect of his submissions was that if the "but for" test is to prevent indemnity if the insured would have suffered the same loss anyway, and I was just using the defence costs example as an illustration of a situation where that is not the case.

The other postscript is, and this was entirely my fault yesterday, the other was probably as well, I meant to take you to the Court of Appeal in Silversea, a very short passage and I forgot to do so, and it's bundle E, tab 19, page 443 {E/19/443} and it's paragraph 104.

Just to set the scene, the issue in the Court of Appeal was narrower than at first instance and it turned on an exception on this ground, and in particular having -- Mr Justice Tomlinson having said there were concurrent causes, the insurers tried to rely on an exclusion to say that the terrorist attack was the

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subject of an exclusion, and that might explain the way it's expressed in 104.

But in the second half the court says: "The underlying causes of the warnings are not excluded perils, it is simply that they are not covered under Aii as perils in themselves. Something extra is required. However, they are 'an insured event' for the purposes of the contract as a whole. There is no intention under this policy to exclude loss directly caused by a warning concerning terrorist attacks just because it can also be said that the loss was also directly and concurrently caused by the underlying terrorist activities in themselves."

Our submission is that insurers' "but for" causation case is wholly inconsistent with that passage and that outcome. They've not attempted to rationalise their case with it despite our analysis in our case, and we say that it remains the closest equivalent to our composite perils case and if insurers are right, then the decision in Silversea must be wrong, but it isn't.

So can I return now to the topic I was dealing with when we adjourned yesterday and that was the character of the disease risk and I'd already dealt with the general nature of the notifiable disease risk. One then also has to bear in mind that the existing list at the

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time these policies were entered into did include SARS, which it emerged in the early 2000s, the coronavirus for which there was no known vaccine and, of course, it would include some new disease, viral or bacterial, for which there was no vaccine or effective treatment that might emerge after inception.

The policies could have but did not restrict the ambit of their application to a specified list of diseases and some insurers did do that. One of the reasons we lost on Ecclesiastical was that there was an exclusion which limited disease cover to a specified list of diseases, but these insurers chose to take the plunge and offer insurance against whatever disease might show up and be added to the list, in particular, one capable of causing an epidemic because that is what notifiable diseases are all about and the history of humanity has been littered with catastrophic epidemics.

The third feature is -- and this is recorded in the judgment -- there is no predictability or regularity about the way in which a disease such as those contemplated by the notification requirement might emerge and spread. One is necessarily talking about diseases potentially with the capacity to spread as an epidemic and they would do so unpredictably and irregularly. In particular they don't spread in neat

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1 circles . There would be no obvious reason for a disease
 2 capable of causing an epidemic to be confined to
 3 a particular neat circle .
 4 Fourthly, there were recent examples of extreme
 5 reactions to outbreaks of a new form of virus. I don't
 6 need you to go to the page, but you'll see at bundle
 7 {D/11/1543} there is reference that during the SARS
 8 epidemic all sites of public entertainment in Beijing
 9 were closed for six weeks, that was 3,500
 10 establishments, and also on that page you'll see --
 11 these are agreed facts, so part of the evidence before
 12 the court -- 2009, there was a Swine Flu outbreak in
 13 Mexico. Initially they shut down schools, museums and
 14 so on and that was followed by a five-day national
 15 lockdown.
 16 So, yes, unprecedented in the UK, but there were
 17 precedents elsewhere and the statutory powers were there
 18 to do the same thing in this country. Parliament didn't
 19 have to rush in new statutory powers. As I showed you
 20 yesterday, they were already there.
 21 The third feature that was character of the disease
 22 risk, the third element is that if, because of the
 23 nature of the risk, the authorities did react to
 24 a disease outbreak, they would be reacting to the
 25 outbreak as a whole. That is an important factor. That

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1 must have been appreciated by the parties that that is
 2 what would happen.
 3 So even if the outbreak included localities within
 4 a particular radius of the insured's premises, the
 5 pattern of the outbreak would be unpredictable and fluid
 6 and that meant that if there were instances of the
 7 disease within 25 miles or one mile of the premises,
 8 there would in all likelihood also be instances of the
 9 disease outside that radius even if the disease was only
 10 local or regional.
 11 Perhaps it might be helpful at this stage just to
 12 illustrate this point to go back to have a look at the
 13 map in our appeal case at {B/10/386}.
 14 You should have there a map of a one-mile radius
 15 from the Royal Courts of Justice and going to the north
 16 of the circle, if there was an outbreak of disease for
 17 which there were cases in Clerkenwell to the north, it
 18 would be likely also for there to be cases in
 19 Pentonville.
 20 Going to the next page {B/10/387}, if we go to the
 21 west-north-west of the circle and you'll see Amersham is
 22 intersected by the radius of the circle. If there was
 23 an outbreak in Chesham within 25 miles of the Royal
 24 Courts of Justice, it would be likely to affect both
 25 East Chesham within the radius and West Chesham outside

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1 it. One doesn't need to have any great foresight to
 2 understand that.
 3 Perhaps more to the point, someone with, let's say,
 4 a restaurant opposite the Royal Courts of Justice whose
 5 business is closed down because of an outbreak of
 6 a disease either in Clerkenwell or in Chesham, one mile
 7 or 25 miles away from the premises is only going to be
 8 affected because either there is a serious outbreak of
 9 numerous cases scattered around both inside and outside
 10 the policy area, or because, albeit there may be some
 11 scattered cases around that 25-mile radius, any of these
 12 cases represent a serious threat to public health.
 13 This demonstrates, as the court held, that these
 14 policies, even the one-mile radius ones, are
 15 contemplating the disease affecting a wide area, either
 16 because of the spread of the disease or because of the
 17 threat to health that the scattering of cases, if it's
 18 in the early stages, might represent.
 19 That all brings one to the fundamental question when
 20 considering how to construe the language of the policies
 21 as to whether the intention was or could realistically
 22 have been to confine indemnity under the policies to
 23 situations where the cases within the relevant policy
 24 area alone, that is taking them in isolation from all
 25 other parts of the outbreak, were the sole proximate

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1 cause of the interruption or interference. That is
 2 effectively either through construction or through their
 3 "but for" analysis is where insurers with the disease
 4 clauses want to take you. That would necessarily
 5 exclude indemnity for any disease outbreak other than
 6 one confined exclusively to the relevant policy area and
 7 that the court, we submit, rightly concluded is
 8 inconsistent with the nature of the risk that is being
 9 insured.
 10 The way in which the insurance provisions are
 11 expressed, however, is wholly consistent with their
 12 having been intended to operate consistently with the
 13 nature of the risk and when after all these instructions
 14 (inaudible) I come to individual wordings, I will seek
 15 to -- yes.
 16 LORD LEGGATT: Haven't you slightly overstated the position,
 17 Mr Edelman? It's not necessary to insurers' case, is
 18 it, that all the incidents of the disease are within the
 19 radius? They say that the cases within the radius must
 20 be sufficient to bring about the result, in effect.
 21 MR EDELMAN: That is --
 22 LORD LEGGATT: They could contemplate a few cases, they
 23 could contemplate some cases outside.
 24 MR EDELMAN: De minimis, yes. They could contemplate
 25 de minimis cases, but that is unrealistic when you are

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1 even assuming one mile away, all the more so 25 miles
2 away, that you are assuming something remote from the
3 premises, not directly affecting the premises, something
4 remote from the premises which is a disease outbreak and
5 it is, we submit, inconsistent with the nature of the
6 risk for it to be proceeding on the premise that there
7 will only be de minimis instances of the disease
8 outside, because that's not consistent with what they're
9 insuring.

10 We submit there's some particular features -- the
11 fourth element -- particular features of the policy
12 which are consistent with a recognition of the nature of
13 the risk that they are insuring.

14 Now, one thing perhaps you may or may not have
15 noticed but is noticeable when you were being taken
16 through the policy terms by insurers' counsel is that
17 they don't even require any particular case in the
18 radius to have been the subject of a notification under
19 the regulations, or even to have been the subject of
20 diagnosis. Now, if they had wanted the cases in the
21 policy area to be the real cause of the interruption or
22 the government action, I should say, then one might have
23 expected that they would specify that. But, as I say,
24 they don't require notification or even diagnosis and
25 some don't even require cases of the disease to be

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1 symptomatic. And for those that do, symptomatic is
2 enough.

3 So the fact that someone in the relevant policy area
4 has lost their sense of smell and taste is sufficient
5 whether or not they've gone to a doctor and the doctor
6 has diagnosed it and the doctor has notified it.

7 Another feature you'll notice is that none of the
8 policies contain any qualification as to the tier of
9 authority that reacts to the disease outbreak. For
10 example, they don't specify that it has to be local and
11 thereby encompassing regional or national. They leave
12 the matter entirely open.

13 All these features are consistent, and we say only
14 consistent, with the policies operating in harmony with
15 the nature of the risk that was being insured and with
16 the court's conclusion that all these policies are
17 focusing on is the mere presence of the disease within
18 the policy area, because if more was required the
19 policies could have said so in either of the respects
20 that I've specified, either action of the
21 local authority only, or requiring that the relevant
22 cases are those that have been notified to the
23 local authority.

24 So we come to the next feature, which is whether
25 there is a commercial purpose to the relevant policy

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1 area. This was a matter on which I was taxed by
2 Lord Justice Flaux in the initial stage of the case
3 where he initially perceived our submissions as
4 undermining the purpose of the radius. But as you've
5 seen, the court was persuaded that there is a very real
6 commercial purpose to the radius and it again is one
7 which is consistent with the nature of the risk.
8 Because it's there to ensure that for there to be cover,
9 the area surrounding the insured must have been caught
10 up in the outbreak and not merely impacted by reaction
11 to some remote outbreak.

12 Of course, as this case has demonstrated, when you
13 have a serious outbreak, the government will act
14 nationally and places like the Scilly Isles did get
15 caught up in it, even though they had no cases, because
16 of the need to prevent spread where it is but also where
17 it isn't yet and you're trying to prevent the places
18 where it isn't yet from being affected by it. In that
19 regard, the insurers have some protection from the
20 disease risk.

21 Yes, my Lord.

22 LORD LEGGATT: What is the point of having any radius? If
23 the Scilly Isles are caught up in it, even though
24 they've got no cases, the radius might shut them out.
25 It's a useless qualification on your argument.

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1 MR EDELMAN: No, because there's no insurance cover in the
2 Scilly Isles.

3 LORD LEGGATT: So they are shut out?

4 MR EDELMAN: Yes, yes.

5 LORD LEGGATT: Yes.

6 MR EDELMAN: Sorry, I may have misspoken, but what I meant
7 was that the Scilly Isles get caught up in the lockdown
8 even though there are no cases within a 25-mile radius
9 of the Scilly Isles --

10 LORD LEGGATT: I see.

11 MR EDELMAN: -- and therefore insurers don't pay.

12 LORD LEGGATT: Right.

13 MR EDELMAN: So I was describing the nature of the disease
14 risk that my Lords remember my 25-mile circles. There
15 are some of those circles which are more loosely
16 populated than others and some which are more densely
17 populated, and one can imagine that there may well be
18 one circle which is not affected by the disease but the
19 rest of the country is and the government still acts
20 nationally. This is in fact -- and what I'm doing now
21 is turning insurers' "but for" case against them to
22 demonstrate the purpose of the 25-mile circles because
23 they say, well, Mr Edelman's map of these 25-mile
24 circles, accepting its artificiality for a moment,
25 demonstrates that if there had been no disease in one of

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1 those circles , the government would probably still have
2 acted as it did. I say that demonstrates the protection
3 insurers have because people in that 25-mile radius
4 circle had no insurance cover.

5 The benefit to insurers , of course, is that the
6 smaller the area the greater the prospect of there being
7 no cases of the disease within it. If you have
8 a 25-mile area, you have a much greater chance of the
9 disease being within that 2,000-mile square area.

10 But if you only have a one-mile limit, you've only
11 got 3 square miles to play with. Unless, of course, the
12 only time it doesn't make a difference is when you have
13 a really , really severe epidemic such as we have had and
14 still have in this case. Only then does the policy area
15 cease to be a relevant protection to insurers , but
16 that's rather like saying that an insurer who insured
17 various properties around the South-East who never
18 expected there to be an accumulation risk saying, well ,
19 I never intended to insure the October 1987 storm
20 because that was an unprecedented storm which gave rise
21 to an accumulation risk for insurers insuring properties
22 in the South-East of England... which they never would
23 have contemplated.

24 But that's insurance for you. Sometimes bad things
25 happen, and that's just exactly what has happened here.

1 They have insured the disease risk , perhaps on the basis
2 that everybody assumed that it would be rather like it
3 was before, but along comes the disease equivalent of
4 the October 1987 storms and I'm afraid that's the risk
5 that insurers take. What they're trying to do, we
6 submit, is escape from the consequences of the policies
7 they've written because the catastrophe risk in the
8 category of risk they have underwritten has transpired.

9 The sixth factor is the consequences of insurers'
10 approach and a powerful factor, we submit, against the
11 construction of causation arguments advanced by insurers
12 and a factor that was taken into account by the court is
13 the arbitrary and irrational consequences of
14 a requirement that the interference or interruption be
15 caused solely by cases of the disease within the policy
16 area subject to the de minimis, perhaps, exception that
17 we were discussing a moment ago, but that is the result
18 one way or another that insurers seek to achieve and we
19 submit that that is demonstrably inconsistent with the
20 nature of the risk being addressed by the clause. As
21 I've already submitted, outbreaks do not occur in neat
22 circles . Why should the response of the policy differ
23 simply because the pattern of spread means that it is
24 outside as well as within a policy area if it's
25 doughnut-shaped instead of round-shaped in its spread?

1 Why should a policyholder on the eastern side of
2 Leicester with a one-mile radius policy be refused cover
3 for the local Leicester lockdown in circumstances where
4 there are many cases of COVID within the 3 square mile
5 circle around his property simply because there were
6 also many other cases on the western side of Leicester
7 outside that circle and Leicester was locked down
8 because of all the cases in Leicester?

9 Insurers would fairly be able to say that all of
10 Leicester would have been locked down whether it had
11 just been the eastern side of Leicester or the western
12 side of Leicester that had been affected by the
13 outbreak. But insurers' case is that if that 3 square
14 mile area had, on their hypothetical, miraculously and
15 incredibly been disease-free, because all of Leicester
16 would still have been locked down there is no cover as
17 Leicester obviously would have been on lockdown to
18 prevent the disease spreading from the western side to
19 the eastern side.

20 One just has to look at the clauses to see whether
21 that makes sense of the nature of the risk that's been
22 insured and whether one can really read that sort of
23 result in either to the policy language or force that
24 result onto the policy language by some "but for"
25 causation test.

1 Then we have also the questions as to why the policy
2 should — because this is the consequence of insurers'
3 submission — why should the policy respond differently
4 to a disease that spreads slowly with localised
5 lockdowns initially as compared to one which spreads
6 rapidly , where the lockdown imposed on each locality is
7 imposed simultaneously by a regional or national
8 authority? These consequences do appropriately attract
9 the description of, in our submission, being arbitrary
10 and irrational . If that is the way accurately to
11 describe those consequences, then we say they cannot
12 have been intended or at the very least would require
13 very clear words for a court to conclude that such
14 consequences were intended.

15 Of course, there would be the impracticality given
16 the nature of the disease risk of ever proving causation
17 by reference to cases only within the policy area in any
18 disease outbreak case of any significance . This
19 outbreak just serves to highlight that point, that it
20 would arise even with a lesser outbreak unless it truly
21 was a very small localised outbreak.

22 But if insurers were intending to insure only the
23 disease at the very lowest end of the spectrum, then
24 they could and should have said so in clear terms and
25 they would have set, as I've submitted, different

1 criteria for the triggering of the policy.
 2 They seem to assume in their submissions that all
 3 these factors are just a consequence of their
 4 construction and it's a so be it, and that's the
 5 parties' bargain, without addressing the point that we
 6 have made and that the court made that the anomalous
 7 consequences of a construction make it unlikely that it
 8 was intended by the parties. And, as I submitted, these
 9 anomalous consequences apply even without a pandemic but
 10 just a more localised outbreak because the cover depends
 11 on the lottery of how many cases are outside the policy
 12 area in addition to those inside the policy area.

13 LORD HAMBLEN: Mr Edelman.

14 MR EDELMAN: Yes.

15 LORD HAMBLEN: If you're right on concurrent causation and
 16 there's no "but for" requirement --

17 MR EDELMAN: Yes.

18 LORD HAMBLEN: -- do any of these points really affect the
 19 construction issue?

20 MR EDELMAN: No, they don't. If I'm right on concurrent
 21 causation, if the "but for" point doesn't arise, then
 22 this doesn't matter.

23 LORD HAMBLEN: Right.

24 MR EDELMAN: This is really supporting the court's approach
 25 to construction which avoids the causation argument,

1 which is essentially that what these policy requirements
 2 are about is the fact that the outbreak must have
 3 a presence in the policy area. In other words, the
 4 policy area must be affected not just by what the
 5 government has done or the public authority has done but
 6 also by the disease itself. That's what these
 7 submissions are directed to. But my Lord is right, if
 8 concurrent causation works then that undermines
 9 insurers' entire case.

10 But in order to support the court's construction
 11 I just need to deal with some of the far-fetched
 12 examples the insurers have come up with in an attempt to
 13 undermine our argument. Our main point is that these
 14 are entirely divorced from the reality of the
 15 significant proportion of the population having been
 16 affected by this disease.

17 One example is a man in a trawler who happened to
 18 stray inside 25 miles of the Scilly Isles. Well,
 19 clearly there would be an argument about whether a case
 20 of someone at sea was actually the sort of case the
 21 government was considering even when it was considering
 22 everything in the round. Their concern would have been
 23 when the crew came ashore. The concern was the spread
 24 of the disease in the country and that would only happen
 25 when the crew disembarked. So there would be a very

1 real question as to whether the causation test
 2 formulated by the court or even our alternative
 3 concurrent causation test was actually satisfied by such
 4 a case. So these are far-fetched examples.

5 The other one was an infected driver on a journey.
 6 Clearly, each stop that driver made would be relevant.
 7 Someone who is a carrier of the disease who stops at
 8 a motorway service station is a very clear disease
 9 spread risk and that there may be a lockdown of the area
 10 of someone with a contagious disease as to stop someone.
 11 That's why the government wanted to stop people
 12 travelling no doubt because as they travelled they would
 13 come into contact with people.

14 Now, it's unnecessary for the court to decide, we
 15 submit, whether where transit is through an area without
 16 stopping in a car with the windows closed is sufficient
 17 for the clause and also the more far-fetched -- even
 18 more far-fetched -- example, someone in an aeroplane
 19 flying overhead and not landing in the area or even in
 20 the UK is relevant. We say these are far-fetched
 21 examples and wouldn't satisfy a causation test.

22 It's not going to arise on this pandemic because,
 23 apart from the odd notorious case, an
 24 insured/a policyholder, wouldn't be able to prove such
 25 a journey and, as I've submitted, they would need to

1 show a causal link. But we say that the detachment from
 2 reality which these examples demonstrate is a hallmark
 3 of insurers' submissions.

4 Now, can I move from those general points to some
 5 construction points which were dealt with in the
 6 submissions, and what I intended to do is, hopefully to
 7 save time, rather than going through laboriously the
 8 same points in each policy -- and I will come to the
 9 policies shortly -- what I want to do is just deal
 10 generically with some of the sorts of points that have
 11 been taken because we have dealt with these points in
 12 the respondent's case as well.

13 One aspect: Is interruption part of the insured
 14 peril? Mr Kealey in his submissions appeared to include
 15 interruption in his definition of the peril, that's
 16 Day 1 at page 128 {Day1/128:1}. And insurers seem to
 17 recognise that this doesn't really go anywhere because
 18 of the requirement of a causal link or will turn on the
 19 language of the policy which indicates whether the
 20 default proximate cause test has been modified by the
 21 parties. But just in case it matters, we say that on
 22 analysis, interruption and interference are an element
 23 of the peril because they are addressing an operational
 24 impact on the business. What is being insured -- and
 25 you see this explicitly in a number of the policies --

1 is loss, as defined in the policy mechanisms, which must
 2 be caused by the operational impact on the business,
 3 namely interruption or interference, in turn caused by
 4 whatever is designated as the insured contingency.
 5 This ties in with the history of the evolution of
 6 cover, we say, for consequential loss in damage cases
 7 with a requirement that for consequential loss to be
 8 recovered it must have been caused by interruption or
 9 interference with the business. But — yes.
 10 LORD LEGGATT: Is it any part of your case, Mr Edelman, that
 11 some subtle distinctions are to be drawn between phrases
 12 like "resulting from" or "following", or do you accept
 13 that they all should be taken to be one or another way
 14 of indicating proximate cause?
 15 MR EDELMAN: I don't accept "following" is proximate cause
 16 and Hiscox agrees with us on its clause. They agree
 17 that "following" is a word which is not consistent with
 18 proximate cause. Other words we're prepared to accept
 19 "as a result of proximate cause" but underlying all our
 20 submissions is that actually it doesn't matter because
 21 of our concurrent cause argument.
 22 LORD LEGGATT: Yes.
 23 MR EDELMAN: But I do draw the line at "following" and
 24 I will deal with the one case where that arises when
 25 I come to that wording. I will deal with it. But we

1 say that is a departure from proximate cause, as Hiscox
 2 agrees.
 3 Now, some reliance is placed on surrounding clauses
 4 being focused on damage to premises or something
 5 happening at the premises. As we've said in our case,
 6 these disease clauses are still premises-based because
 7 there must be an interruption or interference with the
 8 business carried on at the premises. The fact that they
 9 are contemplating something not specifically linked to
 10 the premises is inherent in the contemplation of
 11 a disease outbreak some way away from the premises,
 12 having an effect on its operations and under these
 13 disease clauses in a way which is not specified. It can
 14 be any consequence of the disease which then has
 15 an effect on the business at the premises.
 16 One other aspect insurers refer to is "disease at
 17 the premises" and that's relied on as part of the
 18 construction exercise as trying to demonstrate
 19 a locality. We say that in the context of the cover
 20 also given for wide area disease outbreak, the natural
 21 conclusion to draw as to the intended sphere of
 22 operation of the disease at the premises element of the
 23 cover is to address specific measures taken in relation
 24 to the premises. That operates as a rational dividing
 25 line between the two elements of disease cover. They're

1 intended to capture different aspects of the disease
 2 risk, one capturing something which may happen
 3 specifically to the premises because of something that
 4 happens at the premises or where the premises is the
 5 source of something that happens, and the other where
 6 the disease is the disease outbreak affects the business
 7 at the premises but has nothing directly to do with the
 8 premises itself. It's caught up in the consequences of
 9 a wide area disease outbreak.
 10 Two other topics. Other territorial scope clauses
 11 which my Lord referenced to. Now, the way in which
 12 those territorial scope clauses, clauses perhaps with
 13 a radius limit, might impact depends on the nature of
 14 the peril that's being addressed and I will deal with
 15 that more specifically when I come to the Hiscox policy,
 16 where Mr Gaisman made a point about that. But they
 17 don't assist in understanding how a disease peril
 18 operates. So one needs to look at the nature of the
 19 peril that was being contemplated when the radius
 20 applies.
 21 But even those other clauses are not without the
 22 same issues. If I can ask my Lords just to look briefly
 23 at a clause in the Arch policy. That's {C/5/317} and so
 24 you understand the significance of it, this is for guest
 25 houses and bed and breakfast establishments; so holiday

1 industry. Perhaps unsurprisingly in that context at
 2 clause 5 there's a pollution and oil spillage clause:
 3 "Pollution or oil spillage on a beach river or
 4 waterway within a 25 miles radius."
 5 What if the establishment loses business because,
 6 let's say, a whole stretch of coastline is closed, so
 7 people don't want to come there on holiday, because
 8 there is a spillage along a five-mile stretch of
 9 coastline two and a half miles of which is inside the
 10 policy radius and two and a half miles is outside the
 11 policy radius and the authority action affects the
 12 policyholder because they close that whole stretch of
 13 coastline. A length either side obviously of the
 14 clean-up and they would be worried about preventing the
 15 contamination spreading to other parts of the coastline.
 16 Is it seriously to be said that there would be no
 17 cover because if the authority would have acted in the
 18 same way if the pollution had just been of the two and
 19 a half miles outside the policy radius, or is it
 20 sufficient that there is contamination within the policy
 21 radius and that is part of the pollution and
 22 contamination spillage? In other words, there is
 23 presence of contamination of a beach within the 25-mile
 24 radius.
 25 So we would say actually this supports our case. It

1 also operates and can only sensibly be understood as
2 operating as a qualifying condition. Pollution or oil
3 spillage is something which can spread unpredictably and
4 necessarily with an oil spillage fluidly, in fluid
5 patterns as the court said about the disease risk, and
6 we'd say it would be sufficient if the pollution as
7 a whole included some part which was within the policy
8 area.

9 So these sorts of provisions don't actually help
10 insurers, they only hinder them.

11 Finally, a short point made by Mr Gaisman about the
12 food poisoning risk, because he said that was bound to
13 be local. Well, I seem to remember there was something
14 about salmonella and eggs and that was a food poisoning
15 risk which was not exactly regarded as local.

16 Can I now make -- again, these are just preliminary
17 remarks before I turn to the policies which I will be
18 doing, as I said, shortly -- some preliminary remarks
19 about hybrid and prevention of access clauses because
20 these involve a different point about what goes in the
21 counterfactual. Is it all of the ingredients or only
22 some?

23 Now, you'll have seen from their reaction to our
24 pre-trigger downturn point that insurers are very keen
25 to emphasise that the policies are not triggered until

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1 each of the ingredients of the clause is satisfied. It
2 is Mr Gaisman's favourite A plus B plus C plus D
3 example. My maths isn't very good and I can't add up
4 letters, but I think I can do simple addition. So it's
5 got A causing B which then causes C which then causes D
6 and each element in the chain may have its own specified
7 causal test rather than a default proximate cause test,
8 but each element, and we accept this, is specified as
9 having to be the, or a, cause of the next ingredient.

10 Now, this is perhaps a novel issue for the law of
11 insurance because, in my limited experience, one has
12 only had to deal with what might be described as
13 singular perils, like perils of the sea. The Silversea
14 case was one of the few examples of a composite peril.
15 But the Marine Insurance Act, things like perils of the
16 sea, fire and war risks, is addressing what might be
17 described as singular perils as opposed to a peril which
18 requires a succession of causes in combination. So the
19 only experience we can -- the only case that I'm aware
20 of which addresses this sort of clause is Silversea, but
21 the trends clause issue didn't arise in that case.

22 But one cannot, in our submission, fairly or
23 accurately describe these clauses as being anything
24 other than, as the court described it, a composite
25 peril. In other words, an insured peril which comprises

26

1 a number of ingredients. The reality of what insurers
2 under these policies are still trying to do, as they did
3 unsuccessfully below, is to cherry-pick elements of that
4 composite peril in their counterfactual world under the
5 trends clauses, notwithstanding that each element is
6 a required causal ingredient. Given that each element
7 is part of the composite insured peril, we submit that
8 it is heretical and wholly contrary to the commercial
9 purpose of trends clauses to remove an element in the
10 trends clauses in whole or in part.

11 I think I've mentioned -- sorry, I've just have
12 a message that I may have said it was the Arch policy
13 that I was referring to, with the pollution one it was
14 Argenta. If I misspoke, I apologise, it was Argenta not
15 Arch.

16 Can I return to the point I was making. I have
17 messages coming through on my phone, I'm afraid, and
18 it's not like the days when you get an instant sticker,
19 so I do apologise for this method of communication.

20 LORD REED: If you look on the bright side, nobody can tug
21 your gown, Mr Edelman.

22 MR EDELMAN: Well, my Lord, I wouldn't have been wearing
23 a gown in front of my Lords anyway. My suit flap maybe.

24 So, my Lords, as I've submitted, trends clauses are
25 there to make allowance in the quantification process

27

1 for extraneous influences on the performance of
2 a business and not to reintroduce the effect of one of
3 the ingredients of the insured peril itself. That is,
4 we say, inconsistent with the commercial purpose of
5 a trends clause and as we've sought to demonstrate,
6 commercial purpose is not mere assertion on my part,
7 it's what the history and reason for introduction of
8 these clauses reveals.

9 Now, one good indication that this cherry-picking
10 exercise -- yes.

11 LORD BRIGGS: Can you hear me, Mr Edelman?

12 MR EDELMAN: Yes, I can.

13 LORD BRIGGS: Can I just check on your cherry-picking point
14 in its essence before you get to the detail. I think
15 you're saying that if you have a composite type of
16 peril, the A-B-C-D type, then unless you make a choice
17 of one or other of the elements, you end up leaving all
18 of them in the counterfactual.

19 MR EDELMAN: Yes.

20 LORD BRIGGS: (Inaudible).

21 MR EDELMAN: Yes, but subject to the point -- I'm sorry, my
22 Lord, I lost the audio and I think I may have over
23 spoken.

24 LORD BRIGGS: I was just saying thank you if you were simply
25 going to answer yes.

28

1 MR EDELMAN: Yes, yes, that's right. But that was subject
 2 obviously to the point we were discussing yesterday,
 3 that if you have a prevention of access clause, that
 4 doesn't lead in to non-prevention of access-related
 5 losses because what you're doing in the trends clause is
 6 you're readjusting the turnover and you're saying "Well,
 7 your business was closed, people can get to your
 8 business, what loss did you suffer from that?" Then
 9 you're looking at what you take into account in the
 10 counterfactual and it's not open to insurers to say,
 11 "Well, the church was closed, and we accept because it
 12 was closed you had no collection income" -- this was
 13 an example debated below because of Ecclesiastical being
 14 a party to the proceedings -- "but your parishioners
 15 wouldn't have come anyway because of COVID." But the
 16 contemplation that the church would be closed because of
 17 the emergency is part of the counterfactual, you take
 18 out the concurrent cause of the disease.
 19 But, as we say, one good indication that this
 20 cherry-picking exercise is not how these policies should
 21 work is that the insurers running this point have
 22 changed their minds about what is to be extracted, with
 23 RSA changing their mind from their pleaded case and all
 24 their written submissions as late as Mr Turner's
 25 submissions yesterday, and they have been and remain

29

1 inconsistent and, in a number of respects,
 2 incomprehensible. And I will demonstrate that to you in
 3 a moment. But if that is the situation, it's a pretty
 4 good indication that that's not what could have been
 5 intended and it can't be the correct way to go about
 6 things if no one really can say with any confidence or
 7 clarity what it is, which elements are being subtracted.
 8 Just to run through where we are with the insurers
 9 on that, Hiscox have always said, in fairness to them
 10 but there are some difficulties with what they say, that
 11 one takes out the combination but only each element
 12 insofar as it caused the next. So they've said you
 13 always take out the inability to use the premises.
 14 That's in their clause. And they've always -- I don't
 15 think it's helpful to look at their clause while we're
 16 doing this exercise. It may be. If we go to {C/6/401}.
 17 It's:
 18 "... inability ... due to restrictions imposed...
 19 following ... occurrence... [of a] disease."
 20 They've always said you take out the "inability to
 21 use the premises," the first bit. Fair enough.
 22 Then they've said take out the "restrictions
 23 imposed," but they've never until yesterday been
 24 specific about what restrictions you take out. They say
 25 insofar as they cause the inability to use. Well,

30

1 Mr Gaisman, although he took this very swiftly, said
 2 take the example of a nail bar, he said. You remove
 3 regulation 4 in its entirety.

4 Well, that's a bit odd because if you're going to --
 5 one bit only in so far as it causes inability to use,
 6 would you not simply take out the nail bar restriction,
 7 leaving all of the rest of the regulation 4 in? Because
 8 of course Mr Gaisman recognises, perhaps -- yes,
 9 Mr Gaisman.

10 MR GAISMAN: Mr Edelman has misstated what I said. I did
 11 not say that you took out regulation 4 in its entirety,
 12 I said the exact opposite: that you take out the part
 13 which affects the nail bars.

14 LORD REED: Well, we can check the transcript, Mr Gaisman.
 15 Thank you.

16 MR EDELMAN: Right. Well, I obviously -- and this is part
 17 of the problem, I still misunderstood what he was
 18 saying. I found it very difficult. So you just take
 19 out nail bars. Okay. I think we've got there finally,
 20 after an eight-day trial, an exchange of reams of
 21 written submissions, I think I finally understand what
 22 Mr Gaisman is saying now. You take out nail bars. So
 23 you leave regulation 4 as it is, but you imagine that
 24 the government, for some obscure reason, decided that
 25 they were going to exempt nail bars. Of course he has

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1 to do that because he doesn't want to be paying each
 2 nail bar a windfall profit of being the only nail bar
 3 open in the country. So he has to say all nail bars are
 4 gone.

5 So we then have to imagine this world in which the
 6 government has closed everything in regulation 4 and
 7 regulation 5 -- sorry, everything in regulation 4,
 8 except nail bars, but that begs the question: why, if
 9 you're removing that bit, why don't you remove all of
 10 regulation, one legislative provision, and it's all part
 11 of one indivisible government response to the situation.

12 So the counterfactual in this case involves not only
 13 subdividing the elements of one particular regulation
 14 but the whole concept of taking a part, one piece, of
 15 indivisible statutory provision and it then leaves -- my
 16 Lord, Lord Leggatt, yes.

17 LORD LEGGATT: I suppose if you wanted to really tailor it
 18 down and say insofar as, you could imagine hypothetical
 19 regulations which didn't prevent the use of all nail
 20 bars but only some.

21 MR EDELMAN: Yes.

22 LORD LEGGATT: And then imagine that in fact it's only the
 23 aspect that affects this particular nail bar that is
 24 relevant.

25 MR EDELMAN: But it's really -- my Lord, yes, it's

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1 a question — it just becomes a ridiculous
 2 counterfactual. When you actually then are translating
 3 this into the application of the trends clause, of
 4 course I accept entirely that the hypothetical that the
 5 trends clause is contemplating is just that, it's
 6 a hypothetical it's not actually the real world, but you
 7 must be contemplating — and all the textbooks
 8 demonstrate that what you are contemplating — is what
 9 would have happened in the normal real world, not what
 10 would have happened in some world that could never
 11 exist. It's totally impossible to imagine the
 12 government passing these regulations and not including
 13 nail bars save perhaps by inadvertence.
 14 It is just an entirely impossible counterfactual.
 15 The fact that counterfactuals are hypothetical doesn't
 16 mean that one creates one which could never have existed
 17 in any possible scenario. It's just a creature of
 18 Mr Gaisman's imagination and it is just imagination,
 19 because it's a fantasy land.
 20 It really is a recipe for Hiscox to be able to say
 21 "Ah, well, if it only had been nail bars shut,
 22 everything else would have been the same — only nail
 23 bars allowed to stay open, everything else would have
 24 been the same. You would have had no business". Of
 25 course what he still wants in the counterfactual is

1 regulation 6 saying that everybody must stay at home
 2 which is making non-essential travel restricted and
 3 social distancing.
 4 But the even more interesting aspect of Mr Gaisman's
 5 submissions is what he says about disease. Because he
 6 says you take out disease insofar as it led to the
 7 government restrictions and he said as if our failure to
 8 understand it was due to a lack of intellect on our
 9 part, which I will readily confess to, but I think on
 10 this it's perhaps not a symptom of my lack of intellect.
 11 He says it means causatively rather than quantitatively,
 12 as though that is the key to understanding what he is
 13 saying.
 14 I'm afraid to say we still don't understand what
 15 he's saying. If he's saying causatively, then all of
 16 the disease caused the regulations to be passed and he's
 17 admitting that all of the disease must come out, which
 18 is precisely what the court said, which makes one wonder
 19 why he's appealing. But it may be he's saying, well,
 20 you leave all of the disease in, so you assume that the
 21 disease did happen in the counterfactual, but you assume
 22 maybe that the government didn't react to it, and
 23 I don't understand then because you've got the
 24 government reacting to it but leaving nail bars open.
 25 But if you've got the disease in and everything else,

1 nothing's going to happen anyway.
 2 So where this gets him and how it's supposed to work
 3 is just, with respect to him — and I have the greatest
 4 respect for Mr Gaisman — is the one aspect of his
 5 submissions that is and remains utterly incomprehensible
 6 and just shows what the difficulties are in this
 7 cherry-picking exercise.
 8 I now move on to RSA.
 9 In its written case and indeed its defence what it
 10 does is says that you remove the entire 25-mile circle
 11 of the disease not only insofar as it caused closure
 12 restrictions — this is the RSA1 hybrid, perhaps we
 13 ought to have that open. The relevant clause at
 14 {C/15/1129}:
 15 "Closure or restrictions placed on the Premises as a
 16 result of a ... disease ... within a radius of
 17 25 miles."
 18 So what he says is they took out the 25-mile circle
 19 of the disease and their case was — and this is their
 20 defence most clearly at paragraph 62, we don't need to
 21 look at it, I will give you the reference it's
 22 {G/19/162} — they say that means that COVID would still
 23 have been present outside the relevant area and that's
 24 really part of the radius point.
 25 But that was the extent of his counterfactual. He

1 left all of the restrictions in. He didn't say anything
 2 about that, but then Mr Gaisman obviously had a word
 3 with him when we pointed out some continuing
 4 inconsistencies in our respondent's case because
 5 yesterday he changed his mind and said that he was
 6 wrong.
 7 Now, what he now says remains, how can I put this,
 8 rather opaque, because, of course, his clause is in
 9 rather a different form from Hiscox 1 to 3, which we
 10 were looking at. It has a radius. It may be that
 11 because he didn't understand the disease insofar as he
 12 wasn't quite sure what Mr Gaisman was saying about that,
 13 but really I assume he's now saying one only removes the
 14 restrictions insofar as they were placed on the
 15 premises.
 16 But if that's so, I assume, if he's identifying his
 17 position with Mr Gaisman, that must now be his case,
 18 that is not his pleaded case. It's not the case he
 19 argued below, it's not the case he set out in his appeal
 20 case and it is entirely new and it yet again
 21 demonstrates the difficulties that there are if one
 22 starts trying to cherry-pick. Everybody picks some
 23 different cherry.
 24 Then we have Arch and perhaps if we go to their
 25 clause, which is a prevention of access clause and it's

1 at tab 4, page 226 {C/4/226}. Sorry, the relevant
 2 clause is at 227 and we see the introductions at 226.
 3 That's where the extensions start. Sorry, the clause is
 4 at 226 under item 7. {C/4/227}:
 5 "Prevention of access ... due to actions or advice
 6 of a government ... due to an emergency which is likely
 7 to endanger life ..."
 8 Now, Arch had previously said you take out the
 9 government action and the prevention of access from the
 10 counterfactual, but you leave the disease in and that
 11 was their defence and you'll see that, we've given the
 12 extract at {G/17/150}. It's also recorded in the
 13 judgment at paragraph 447 {C/3/158}.
 14 Their appeal case -- this is paragraph 48 (B/4/113)
 15 for your note -- says that the counterfactual is:
 16 "... if the ... prevention of access had not
 17 occurred."
 18 Now, we pointed out in our respondent's case that
 19 this was a change of case, because previously they'd not
 20 just taken out the prevention of access but they'd also
 21 taken out the government action, and Arch has now
 22 reverted to its pleaded case because on Day 2 -- this is
 23 page 80, lines 9 to 13 {Day2/80:10} -- Mr Lockey said:
 24 "... the relevant part of the regulation requiring
 25 the category of business to close its premises is

1 assumed not to have been made."
 2 So I assume he's now aligned himself with
 3 Mr Gaisman's particular point about if it's a nail bar,
 4 it's just the nail bar. That's not what he pleaded. He
 5 pleaded the government action. It's not what he put in
 6 his appeal case and there just appears to have now been
 7 an alignment with Mr Gaisman and it's still not clear
 8 what he actually means. Category of business, does he
 9 mean subcategory of business, going down to the
 10 particular of the nail bar, or just a category of
 11 business, category 4, category 5, category 3? We still
 12 don't really know the answer to that question, and we'll
 13 just have to wait to see if he clarifies it yet again in
 14 his reply submissions.
 15 But the clarification doesn't matter. Again what
 16 matters is the inconsistency and the conflict between
 17 the respective submissions that arises. We say that of
 18 itself demonstrates the impossible task that there would
 19 be to work out, on insurers' approach, what the
 20 counterfactual world would look like. Can I add this
 21 because Mr Gaisman criticised our reference to
 22 2,000-page expert reports. But the court needs to bear
 23 in mind that Hiscox was insistent on introducing into
 24 the -- I've lost the video for Lord Hodge. I hope I've
 25 still got audio contact. Could my Lord, Lord Hodge --

1 LORD HODGE: You have audio contact. I've got a message
 2 saying that something's gone wrong with the video.
 3 We're about to have a short adjournment. I'll sort the
 4 video out during that adjournment, the five-minute
 5 adjournment, and I will sort it out then.
 6 MR EDELMAN: Thank you. I've literally got a few sentences
 7 and then we might pause then anyway.
 8 I just wanted to make the point that Hiscox were
 9 insistent on a set of agreed facts about the position in
 10 Sweden being in the agreed facts and the purpose of that
 11 was that Mr Gaisman's clients would want to argue, it
 12 seems, that the performance of a business without
 13 a restriction should be compared to the performance of
 14 businesses in Sweden where the government did not act,
 15 as it so happens, we believe, because of constitutional
 16 restraints on when the circumstances in which
 17 an emergency could be declared and the powers could be
 18 exercised. But be that as it may, that's what he wanted
 19 to do and they've not resiled from that and so we
 20 presume that they will be using statistics from Sweden
 21 and customer behaviour evidence from Sweden in their
 22 counterfactual if the disease is extracted, whatever
 23 part of the disease is extracted, or government
 24 restriction other than the particular nail bar
 25 restriction is extracted from the counterfactual, hence

1 our concern at 2,000 pages of expert evidence. My Lords
 2 saw the passage in Silversea. The sort of evidence that
 3 insurers tried to adduce in that case about consumer
 4 behaviour and that is what these unrealistic
 5 counterfactuals may well lead to.
 6 My Lords, that was a natural break in my
 7 submissions. I'm about now to turn, at long last
 8 perhaps you might say, to the wordings themselves and
 9 therefore it might be an appropriate moment to take
 10 a five-minute break.
 11 LORD REED: Thank you very much, Mr Edelman. We'll adjourn
 12 now then for five minutes.
 13 (11.45 am)
 14 (A short break)
 15 (11.54 am)
 16 LORD REED: I think we're ready now to resume. Mr Edelman.
 17 MR EDELMAN: My Lords, on Mr Gaisman's intervention, I've
 18 revisited the transcript from yesterday, pages 67 to 68
 19 {Day2/67:1}, {Day2/68:1} and I maintain my stance that
 20 it is entirely unclear what he was saying was a nail bar
 21 only and I would invite my Lords to revisit that part of
 22 the transcript to see what Mr Gaisman said, not to pick
 23 him up on this, he's entitled to clarify what his
 24 submissions meant, but on how shifting this sand
 25 actually is.

1 Now, my Lords, going to QBE, which is the first
 2 insurer I want to deal with because they came up first,
 3 their first policy, QBE1 {C/12/745}.

4 Now, if I can be excused one purely forensic point,
 5 at trial QBE came seventh on the list of eight.
 6 Mr Crane, poor Mr Crane, was promoted to number 1 no
 7 doubt because his clients had success on QBE2 and 3 and
 8 insurers wanted some success on that, but, anyway, he
 9 was sent over the top first. I hope it will be to the
 10 slaughter, but that is in my Lords' hands.

11 Let's start with this policy and what I'm going to
 12 do is make some submissions which will be hopefully also
 13 referable to some of the other policies and save some
 14 time.

15 If we look at the introductory words "interruption
 16 of or interference with the business", you'll just see
 17 looking at the surrounding clauses on this page they are
 18 all prefaced with words "loss resulting from" and if you
 19 go to the previous page, page 30 {C/12/744} you'll see
 20 the same pattern. So just as a small point but it
 21 reinforces the point I was making, all of the other
 22 extensions are prefaced with the words "loss resulting
 23 from" and it looks as though those words are
 24 an accidental omission from this extension because it's
 25 the only one that doesn't have those words and there's

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1 no obvious reason why it doesn't.

2 So those words are to be read in but nothing turns
 3 on it save for that small interruption peril point that
 4 I've mentioned.

5 So it's — if we read this clause, it says
 6 {C/12/745}:
 7 "Interruption ... or interference with the business
 8 arising from:
 9 Any human infectious or human contagious disease."
 10 And one can read the clause quite readily as
 11 applying primarily to those words.

12 LORD REED: And it has to be a notifiable disease?
 13 MR EDELMAN: Yes. Well, then it sets the criteria. This is
 14 my point. It's any disease and then it sets what we say
 15 are two qualifying criteria which is wholly consistent
 16 with the construction that the court has adopted.

17 The first thing is it tells you what sort of
 18 disease, adjectivally what sort of disease, it means
 19 when it says "human infectious or... contagious
 20 disease". It excludes AIDS and it says:
 21 "An outbreak of which the local authority has
 22 stipulated shall be notified ..."
 23 So then that's when you get the qualification that
 24 it should be notifiable.
 25 Then the next and, we say, the court is quite right

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1 it's an adjectival qualification:
 2 " ... manifested by any person whilst in the premises
 3 or within a 25-mile radius ..."

4 "Manifested" means diagnosed or symptomatic but we
 5 say, and it's a simple point but the court accepted it
 6 and we say rightly so, that this is just saying that
 7 you're covered for any human infectious or contagious
 8 disease provided that that disease has manifested itself
 9 in your policy area, which it has, and that's all the
 10 policy's saying.

11 Now, I hope my Lords will see the point, it doesn't
 12 require the policy within the area to have been notified
 13 to the authorities, it doesn't require it to have been
 14 diagnosed. It could be diagnosed but it may not be. If
 15 it is diagnosed then obviously the doctor would have
 16 a duty to report to notify it. But under the
 17 regulations, a doctor has an obligation to notify,
 18 there's also a requirement of a testing laboratory.

19 Some important points to note. QBE did think about
 20 the exclusion of a disease and chose only to exclude
 21 AIDS. They could have limited the scope of this to
 22 a list of diseases or to diseases on the notifiable list
 23 as at inception, but they chose not to do so.

24 There's no reference to a duty to notify point, I've
 25 made that point. And the requirement for manifestation,

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1 simply someone displaying symptoms.

2 And the final point, although it says that the
 3 interruption or interference must arise from any human
 4 infectious or human contagious disease, it's
 5 self-evident that the "within 25-radius" point is not
 6 going to of itself interrupt or interfere with the
 7 business. A disease incident is not directly going to
 8 interrupt or interfere with the business. Something
 9 more has to happen. And this is obviously
 10 contemplating, because of the nature of the disease and
 11 the reference to something which has to be notified if
 12 there is an outbreak, that the public authorities will
 13 be acting, and they will be acting to the whole of the
 14 outbreak. That's part of what the court below — this
 15 is presuming the government's reacting to something.
 16 They're reacting to an outbreak of a disease and this
 17 clause is saying, well, we'll insure you for
 18 interruption or interference arising from the disease,
 19 an outbreak of which has to be notified, as long as
 20 someone in the policy area has manifested the disease,
 21 has symptoms of it.

22 So we submit that on this policy you really don't
 23 have to resort to concurrent cause. It is insuring the
 24 disease on the proviso that someone within the area has
 25 got it. And it's saying nothing about, and deliberately

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1 saying nothing about, the causative impact of the person
 2 or people in the area who happen to have manifested the
 3 diseases, who happen to have symptoms of it. If you're
 4 covering someone who is merely symptomatic, who hasn't
 5 even been diagnosed, that's obvious. That must
 6 obviously be the case.
 7 I should say that QBE has accepted — and I would be
 8 unfair not to make this point — they accept that what
 9 this clause is contemplating is an outbreak of
 10 a notifiable disease and the reaction of the authorities
 11 to it, and that's their case at paragraphs 17 and 18.
 12 So we say —
 13 LORD LEGGATT: Before you move on, Mr Edelman.
 14 MR EDELMAN: Sorry, my Lord, I just looked down.
 15 LORD LEGGATT: It surely doesn't have to involve a reaction
 16 of the authorities.
 17 MR EDELMAN: No.
 18 LORD LEGGATT: It would be enough, wouldn't it, if the fact
 19 that somebody at the premises had got a disease caused
 20 people to stay away, for example?
 21 MR EDELMAN: Yes, yes.
 22 LORD LEGGATT: And not to go and buy things there or they
 23 had to shut the shop as a result. It doesn't require
 24 an authority intervention, this clause.
 25 MR EDELMAN: And this also applies to public reaction, of

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1 course.
 2 So —
 3 LORD LEGGATT: Exactly.
 4 MR EDELMAN: — even if there's no government action and
 5 people themselves become nervous, they hear that there's
 6 an outbreak of the disease or disease in this area and
 7 people stay away from the area, or they stop mixing
 8 voluntarily. That is all covered.
 9 All that's required for the policy trigger is that
 10 someone in the area has symptoms of it and there's no
 11 possible tenable construction, we submit, on this
 12 particular clause to say that the manifestation within
 13 the area must itself be causative as opposed to
 14 a qualifying condition.
 15 LORD LEGGATT: It's certainly a tenable construction, it
 16 just reads, the whole clause, as definitive of what must
 17 cause the interruption.
 18 MR EDELMAN: Well, if it would be a disease — the problem
 19 is it's manifested by any person, it's just manifested
 20 by any person within the disease — within the radius.
 21 That's the problem with this language. As long as it's
 22 manifested by someone, there's no suggestion in the
 23 language that the manifestation of the disease has to be
 24 what is causative. That's my point.
 25 LORD LEGGATT: Well, it depends how you read the clause, but

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1 one reading of it, it's the whole description that has
 2 to be causative.
 3 MR EDELMAN: Well, one can debate it, but we submit that if
 4 insurers wanted to make the manifestation within the
 5 area part of something — part of the causal requirement
 6 that that manifestation has to be causing, then much
 7 clearer language would be required.
 8 But certainly the construction that the court placed
 9 on it is certainly, I would submit, at the very least
 10 a natural reading of the clause. You don't need to
 11 force anything onto it or read words into it, it is
 12 a natural reading of the clause and, compared to what
 13 the insurers could have done requiring the individual
 14 case to have been a case which was notified to the
 15 authorities, it is the most appropriate reading.
 16 But this might be a useful vehicle anyway for then
 17 testing the alternative argument. What if QBE is right
 18 and somehow this policy is to be construed as only
 19 addressing or contemplating cases of the disease inside
 20 the radius in some causative sense? What is the
 21 relevance of the outbreak also being outside the radius
 22 because, of course, it will be the fact that the
 23 outbreak inside and outside is still part of a national
 24 outbreak, and of course the fact that it is part of
 25 a national outbreak is relied on by QBE and the other

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1 insurers.
 2 Our primary answer remains one of construction.
 3 Even if it is addressing or contemplating cases within
 4 the policy radius, it does not require the outbreak to
 5 be only within the relevant policy area, the point the
 6 court made, so as to create the equivalent of
 7 an exclusion clause in the provision in respect of the
 8 causal effect of the outbreak outside the relevant
 9 policy area, and Mr Crane explicitly accepted that in
 10 his oral submissions.
 11 This then leads to two alternative analyses. It
 12 further supports the conclusion of the court that if the
 13 local outbreak is an indivisible part of a national
 14 outbreak, it cannot have been intended that the
 15 indemnity should proceed on the basis of treating the
 16 outbreak outside the relevant policy area as somehow
 17 a competing cause of the interruption or interference.
 18 The other way is to our concurrent cause analysis
 19 based on the court's alternative causation analysis that
 20 each case of COVID was an equally effective concurrent
 21 cause of public reaction and government response.
 22 The analysis, and I'm sure my Lords have got this,
 23 would then be that each manifestation of the disease
 24 would be an equally effective cause of the government
 25 response because all cases of the disease collectively

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1 known and known unknown together form the picture of
2 a national outbreak or pandemic to which the government
3 responded and each case contributes to the causal chain
4 by being part of that national outbreak or pandemic.

5 You then on insurers' analysis of the clause have
6 insured and uninsured concurrent causes, and I know I've
7 been through this in part but I just want to demonstrate
8 it by reference to the policy wording. With the
9 uninsured cause disease manifested outside the 25-mile
10 radius being an uninsured concurrent cause but
11 a concurrent cause which is not excluded.

12 True it is on this analysis that any one case inside
13 the relevant policy area was not individually
14 a "but for" cause of the government response, but the
15 same is true of any individual case anywhere in the
16 country and, of course, even if there had been a local
17 outbreak, the same would have been confined within this
18 25-mile radius, the same could have been said of any
19 individual case within the policy area. You could have
20 said the same of any individual case. So it must be
21 contemplating an outbreak. It wouldn't work otherwise.

22 The factual reality, as found by the court on the
23 agreed facts, is not challenged by insurers is that all
24 cases cumulatively caused the government to act because
25 together they created a picture of a national pandemic.

1 That is not in dispute.

2 One can describe them as interdependent causes or
3 interlinked causes, but whatever label one applies they
4 were collectively the proximate cause of the government
5 acting and each one was therefore a proximate cause of
6 the government action. If they were together, they were
7 individually.

8 Even if one looks at reported cases in each
9 locality, my Lords saw the maps yesterday. Those maps
10 transform the picture of what was happening in the
11 country as the disease spread, and they did so
12 collectively and cumulatively.

13 My Lords, there is no rational legal basis for
14 saying that one can extract one case from the list, but
15 this is insurers' argument. The same one — just
16 because one can extract one case from the list without
17 changing the government response, none of the cases was
18 a cause of the government response, because that is
19 effectively insurers' case.

20 If there's, let's say, a one-mile area and there's
21 only one provable case in that area for a policyholder,
22 maybe because they've only got one reported case, just
23 taking an extreme example, they would say "Ah, well, you
24 could take that one case out and it doesn't make
25 a difference" but you can say that for every single case

1 and that is not the answer to the causation question
2 because you end up with the government having acted and
3 no case of COVID being a cause of the government having
4 acted when they reacted, in fact, to all of them.

5 The proper way to look at it is to treat, we've said
6 you can look at it as a jigsaw, just one way of trying
7 to describe what's going on. That was criticised.
8 Let's look at it as pins. Each case is a pin on the map
9 and if someone down in the Civil Service was sticking
10 pins on the map, yes, of course I accept if one pin had
11 been dropped or missed out, it's not going to make much
12 of a difference. But when you've got all of the pins
13 together, it's each individual pin for each individual
14 case known or known unknown that creates a picture of
15 a national pandemic.

16 To overcome that argument, QBE has to go a step
17 further. It's not enough for them to say that this is
18 a causal requirement that it be within the policy area.
19 They have to go a step further and say not only was this
20 clause addressing the local element of an outbreak by
21 requiring some causal impact, but there was built into
22 it a requirement that the local cases of the disease
23 should be the sole proximate cause of the interruption
24 or interference as opposed to just being a proximate
25 cause. And that introduction of exclusionary language

1 is disavowed by Mr Crane.

2 Now, it could perhaps theoretically have been
3 achieved or be achieved by reading in the words "which
4 is only" before the word "manifested". So "shall be
5 notified to them which is only manifested by any person
6 whilst in the premises or within 25 miles". But that is
7 self-evidently not only reading words into the clause
8 which Mr Crane disavows but is transforming it.

9 Furthermore, we would submit, it's fundamentally
10 inconsistent with the nature of the risk being insured
11 because a notifiable disease contemplates wide and
12 unpredictable outbreaks, including the possibility of
13 an epidemic, and one would expect such a restriction to
14 be clearly expressed in this clause if it was intended.
15 And the wide area is reflected in this particular policy
16 by the 25-mile radius.

17 Therefore, unless that radical construction of the
18 clause is to be adopted, even if the clause is
19 contemplating local outbreaks of the disease, contrary
20 to the court's construction and our primary submission,
21 it doesn't save QBE. And I've dealt with the only other
22 escape they have, which is "but for" causation, which is
23 their other way of reading an exclusion in.

24 Because if you can't get an exclusion in the
25 language "only caused by", then the only other refuge

1 insurers have — and it's perhaps Mr Crane's only refuge
2 because he's disallowed "only" — is through the use of
3 the "but for" test at this stage.

4 So their last refuge to defeat the concurrent cause
5 argument would have to be through the trends clause, and
6 I think we've seen in this clause what the trends clause
7 is. Just to show you the clause itself just to remind
8 you at 819 {C/12/819} it has to be:

9 "[Trends] means adjustments will be made to figures
10 as may be necessary to provide for the trend of the
11 business and for variations in circumstances affecting
12 the business ..."

13 You'll see that "Trend Adjusted", that's a defined
14 term, comes in, for example — and I'm not saying these
15 are the only places, but I think these are the primary
16 places, 816 {C/12/816}.

17 23.97, the definition of "Standard gross revenue",
18 and 23.99, the definition of "Standard turnover", and
19 you see they've all got to be trend adjusted. That's
20 page 816.

21 And going back to 819 {C/12/819} that makes sense of
22 the phrase "adjustments will be made to figures" and
23 that supports, I submit, the submission that what I was
24 saying to my Lords yesterday about this being
25 an arithmetic exercise here, an accounting exercise, not

1 a revisiting of the causation question.

2 What the "but for" test really wants to do is to
3 introduce Wayne Tank by the back door through a clause
4 that, as you can see, is just supposed to be the
5 equivalent of an accounting tool. I say "Wayne Tank
6 through the back door", as my Lords know, that is the
7 leading case which established or recorded the fact that
8 if there are two concurrent causes of loss, one excluded
9 and one insured, the exclusion trumps. If the
10 clause (inaudible) with the non-insured cause is not
11 excluded but just uninsured, then the insurance pays.
12 But what they want to get the trends clause to do is to
13 be a Wayne Tank for them to introduce an exclusion of
14 a concurrent cause, and that is impermissible.

15 I should perhaps deal with one submission that has
16 been made generally by insurers and I can use it here,
17 the significance of the word "within". Our submission
18 about that is that there are limits to what that word
19 can actually be doing.

20 We say it gives sufficient weight and force to it to
21 say that it's just saying that the case that is
22 manifested has to be inside rather than outside the
23 25-mile radius, and that is sufficient for its purpose.
24 But insurers require that to have two additional
25 purposes. Firstly, to signify that the causes that are

1 within the radius have to be causative to confirm that
2 link and, secondly, that they must be the only causes
3 and it's simply far too much weight for that word to
4 bear.

5 My Lords, that's all I wanted to say about QBE1
6 unless there were any questions my Lords had on that
7 policy and I was then going to move to the two policies
8 on which the court found against us, QBE2 and 3, to
9 explain why, in an otherwise impressive judgment, the
10 court made an error in relation to these two policies.
11 I wanted to start with QBE2. The relevant clause,
12 tab 13, page 852 {C/13/852}.

13 We will see it starts with the words "Loss resulting
14 from..." the words that were missing in QBE1 which
15 I said was probably just a mistake.

16 "... from interruption or interference with the
17 business in consequence of any of the following events."

18 I'll come back to those words in a moment, I just
19 want to deal with the body of the clause and you'll also
20 see in (h) and (i) a reference to the word "incident",
21 but I'll come back to those words as well because I want
22 to start with the — I've lost Lord Hamblen's video.

23 I just want to check that I still have audio. Probably
24 not. I'll pause.

25 LORD REED: Yes, if you just wait for a moment, Mr Edelman,

1 I'll just see if I get any message from our engineer.

2 (Pause)

3 MR EDELMAN: I hope it's not my submissions overloading the
4 system.

5 LORD REED: Yes, it looks as though Lord Hamblen has been
6 disconnected for some reason and is going to have to try
7 to join us again.

8 And here he is.

9 MR EDELMAN: I am obliged. I was looking temporarily at my
10 notes, and I may have been slightly slow in noticing
11 that my Lord, Lord Hamblen had gone, but I think I had
12 just been saying some introductory words about this
13 policy.

14 LORD HAMBLÉN: I've heard everything you've said,
15 Mr Edelman, don't worry.

16 MR EDELMAN: So what I want to focus on initially is the
17 core words:

18 "Any occurrence of a notifiable disease within
19 a radius of 25 miles."

20 And "Notifiable disease" is defined — sorry,
21 I forgot to write down the page number, it's defined on
22 page 923 {C/13/923}, and it's 18.67 and it says:

23 "Notifiable disease means illness sustained by any
24 person resulting from ..."

25 And you'll see the disease is defined in similar

1 terms to QBE1:
 2 "any human infectious or contagious disease,
 3 an outbreak of which ... stipulate [s] shall be
 4 notified ... excluding ... AIDS ..."
 5 But this uses the words "sustained by any person"
 6 rather than "manifested", and the court concluded --
 7 again no appeal from these decisions as to what these
 8 terms mean -- that "sustained" would be satisfied simply
 9 if a person was actually infected with the virus. So
 10 it's sufficient if someone was asymptomatic, which again
 11 we say is significant as compared to what -- if there
 12 was going to be some causative element to this as to
 13 compared to what the policy could have required in terms
 14 of requiring a case to have been diagnosed and notified,
 15 a case within the radius to have been diagnosed and
 16 notified to the authorities.
 17 So all it requires is that someone within a 25-mile
 18 radius has become infected with the virus and of course,
 19 as you see from the definition, it realistically
 20 recognises that these sorts of diseases will form
 21 outbreaks. It talks about an outbreak of which is to be
 22 notified. Actually the regulations just refer to
 23 a doctor who diagnoses someone who just then forgot to
 24 report it. You don't have to wait until you've got
 25 a certain number of cases to report it. If you get one

1 case, you report it because these are dangerous
 2 diseases. But the policy is acknowledging what the risk
 3 it's contemplating here is an outbreak.
 4 What QBE says and quite accurately in its case at
 5 paragraph 17, if you want to have the reference, I don't
 6 need to look it up, it's {B/16/619} that they refer to
 7 their policies as insuring against:
 8 "... the impact on the insured business of
 9 a notifiable disease breaking out".
 10 The words "a notifiable disease breaking out" are
 11 their words and that's what happens to
 12 notifiable diseases. If they're going to be a problem,
 13 if they're going to be problems so as to interrupt or
 14 interfere with a business, it's because they will have
 15 broken out.
 16 A single case, that person will be carted off to
 17 some individual quarantine place. We've all heard of
 18 cases of someone coming back from some exotic location
 19 with a dangerous disease. They're detected. They are
 20 whisked off to quarantine. But these policies are
 21 addressing something more than that, which is why they
 22 use the word "outbreak". It's something which will be
 23 of wider significance.
 24 So when we go to the word "occurrence" in (c), what
 25 is that contemplating? We say it must be contemplating

1 an outbreak comprising of however many cases occur in
 2 the policy area. It's an occurrence -- of course we say
 3 it's an occurrence of a notifiable disease of which
 4 there are cases in the area, but the word "occurrence"
 5 must be contemplating an outbreak. It may be that
 6 therefore contemplating -- yes, Lord Leggatt.
 7 LORD LEGGATT: It doesn't really help to try and substitute
 8 the word "outbreak" for "occurrence", does it, because
 9 it can be one person or it could be several? What seems
 10 to me pretty obvious on the wording of this clause, even
 11 if not the last, that there has to be a causal
 12 connection between the occurrence within the area and
 13 the interruption, but you say that's satisfied if you
 14 don't apply a "but for" test. Isn't it as simple as
 15 that?
 16 MR EDELMAN: Well, my Lord, if you are looking at -- if you
 17 treat -- it depends how you read this clause and the
 18 court read this one differently, but you'll see there is
 19 some similar language coming up, and if you read
 20 "occurrence" as being an outbreak, and it's an outbreak
 21 of a notifiable disease, what are the words "within the
 22 radius"? Are they saying an occurrence of
 23 a notifiable disease only within the radius or only
 24 insofar as it's in the radius? Or when it's talking
 25 about -- if the word "occurrence" is capable -- because

1 if you look up the word "outbreak" and it talks about
 2 the occurrence of a disease, an occurrence of a disease.
 3 So an outbreak is encompassed -- let's say
 4 encompassed -- within the word "occurrence" and
 5 certainly must be primarily what this clause is
 6 contemplating because it's contemplating something some
 7 distance from the premises which interferes or
 8 interrupts with the business, so it must be
 9 contemplating something which is serious enough for the
 10 authorities and/or the public to react to, even though
 11 it may be 24 miles away, so as to interrupt or interfere
 12 with the business.
 13 Now, theoretically it can cover one case, but the
 14 word "occurrence" we say is more naturally to be
 15 understood as contemplating an outbreak, and an outbreak
 16 is naturally something that one would describe as
 17 an occurrence. You know, it may not be particular time,
 18 a particular place, I'll come back to that in a moment
 19 when I come to the concept of an event, but one's
 20 applying this concept to a notifiable disease. And when
 21 one --
 22 LORD LEGGATT: I don't see at the moment where all this is
 23 going. I mean, your whole argument is that one case is
 24 enough. If it contributes to --
 25 MR EDELMAN: Yes.

1 LORD LEGGATT: -- a national restriction, then it does
 2 cause, along with all the other cases, the interruption
 3 to the business.
 4 MR EDELMAN: Yes, but --
 5 LORD LEGGATT: And that is an argument I can understand.
 6 MR EDELMAN: Yes.
 7 LORD LEGGATT: What I find much harder to understand is
 8 you're trying to rewrite (c) so that it means something
 9 other than an occurrence within 25 miles of the
 10 premises.
 11 MR EDELMAN: Well, it depends whether you read it as if it
 12 were to say "an occurrence of an outbreak of
 13 a notifiable disease which is present within a 25-mile
 14 radius -- 25 miles of the premises". That's how the
 15 court read it, because they're looking at the concept --
 16 this is why you get back to the concept of what you're
 17 dealing with. You're dealing with a notifiable disease
 18 which, if it's going to cause a problem to --
 19 LORD LEGGATT: Well, actually, it's not the outbreak which
 20 is covered, it's the occurrence of the
 21 notifiable disease which is "illness sustained by any
 22 person". So you have to have an illness sustained by
 23 a person within the 25 miles.
 24 MR EDELMAN: Yes, but --
 25 LORD LEGGATT: And that has to be causative and on your case

1 it is.
 2 MR EDELMAN: Yes, on our case it is, yes. But we submit
 3 that on this particular language that although it says
 4 "illness sustained by any person" it's contemplating
 5 necessarily a disease outbreak, because that's what it's
 6 contemplating, and it's a question whether within
 7 a radius of 25 miles is something that qualifies the
 8 outbreak. So you're only dealing with that part of
 9 an outbreak because what one has --
 10 LORD LEGGATT: That may not help. I'm struggling at the
 11 moment to understand why you need to go through these
 12 contortions to try and make the clause read as though
 13 it's insuring an outbreak, whether within or without,
 14 rather than an occurrence of a disease by a person
 15 within 25 miles, which is what it seems to say.
 16 MR EDELMAN: I think the critical point is that one reads
 17 that as an exclusionary requirement and that may be as
 18 far as I need to go. If one doesn't read it as an
 19 exclusionary requirement, then that's sufficient for my
 20 purposes.
 21 LORD REED: You're not saying, Mr Edelman, are you, that if
 22 there were only one case and it was within the 25-mile
 23 radius that wouldn't be sufficient?
 24 MR EDELMAN: No.
 25 LORD REED: No.

1 MR EDELMAN: No.
 2 LORD REED: Right. You're not saying there has to be
 3 an outbreak that extends beyond the radius?
 4 MR EDELMAN: No.
 5 LORD REED: No, right.
 6 MR EDELMAN: But what I am submitting is that because
 7 this -- and I'm just trying to support the approach the
 8 court's adopted in other policies -- that if the clause
 9 is -- if what the nature of the risk that's being
 10 contemplated is an outbreak and you're talking about
 11 something that could be 25 miles away, within the sphere
 12 of the scope of operation of the clause will be
 13 a distant -- will be an outbreak which will be of
 14 varying extent but may well be within and without the
 15 radius.
 16 Now, the question is, it may be that you answer the
 17 answer in different ways. One answer may be: well,
 18 because that is the contemplation and for whatever other
 19 legal reasons one doesn't apply "but for", but one other
 20 approach is to say, because that is what the clause
 21 contemplates, when one's looking at the radius
 22 requirements and the outbreak, one is looking at the
 23 radius requirement as being a qualifying rather than
 24 a causal requirement. I've made that submission,
 25 I don't think I can take it any further.

1 But the court took the view that it was only the
 2 inclusion of the words of "events" and "incident" which
 3 introduced the causal requirement and we don't accept
 4 that as being a distinction from other policies.
 5 But it may be that I should perhaps just briefly
 6 make my submissions on "event" just simply because it
 7 was something that the court relied on as an additional
 8 factor and we would say was wrong.
 9 We say that the words "the following events" is
 10 simply here used as a catch--all word to summarise what
 11 follows without giving them any particular
 12 characteristics, and so the starting point of treating
 13 "event" as being definitional is erroneous.
 14 I will deal with this briefly, as briefly as I can.
 15 "Event" may have an established meaning in the context
 16 of reinsurance aggregation clauses, in particular the
 17 JELC clauses, but what it means in each case must depend
 18 on the context in which it appears and in particular
 19 what it is being applied to.
 20 As I submitted multiple cases of a disease within
 21 the relevant policy area and outside would be regarded
 22 as an outbreak and one can fairly describe an outbreak
 23 as an event, and there's no reason why if the outbreak
 24 is also outside the relevant policy area that should
 25 stop it being an event or create a separate event. It's

1 all one outbreak.
 2 LORD REED: Why can you not simply regard each occurrence as
 3 being an event?
 4 MR EDELMAN: Well, the only difficulty with that is it all
 5 depends if one is applying "but for" or not. If one is
 6 applying "but for", you then end up with a situation
 7 that no one outbreak of the disease causes anything even
 8 locally, even if it was confined within the 25 miles.
 9 If you're not applying "but for", then I don't have
 10 a problem.
 11 LORD REED: Yes.
 12 MR EDELMAN: These submissions are only made because of the
 13 "but for" hurdle that's been put in front of me. If the
 14 "but for" hurdle goes and it is inappropriate, as I've
 15 submitted, then none of this really matters as long as
 16 my Lords are with me on the concurrent cause — my
 17 Lords, I'm obviously not assuming anything — if my
 18 Lords were to be with me on the concurrent cause case
 19 and with me on "but for", then none of this matters. It
 20 really doesn't matter how these are construed unless
 21 they are construed in an exclusionary way so as
 22 themselves by their very language to bring in
 23 a Wayne Tank sort of principle so as to exclude the
 24 effect of concurrent cause, and that, we would submit,
 25 is going a stage too far.

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1 My Lord, Lord Hodge, yes.
 2 LORD HODGE: You say that the concurrent cause test is
 3 an answer, but the various cases that we've been given
 4 on concurrent cause, whether it's Reischer or Silversea,
 5 ENE Kos and Miss Jay Jay, they are all cases where there
 6 are two concurrent effective causes. They're not cases
 7 where there is one cause which is an effective cause and
 8 another cause which isn't. Do you accept that?
 9 MR EDELMAN: Yes, obviously because — I accept that because
 10 the proximate cause test is always looking for the
 11 dominant and effective cause and you may on analysis of
 12 the facts find one that is. Even though there are other
 13 competing causes, and in Wayne Tank itself the court
 14 divided the majority finding that one cause was the
 15 dominant cause, Cairns LJ deciding that actually he
 16 thought it was more evenly balanced, but all of them
 17 deciding that the result was the same anyway because
 18 even if they were evenly balanced, the competing cause
 19 which Lord Cairns decided was evenly balanced when the
 20 others didn't was excluded anyway.
 21 So I quite accept that you don't get into concurrent
 22 cause if you've identified one dominant effective cause.
 23 When you're looking at the disease outbreak, you can't
 24 identify one proximate cause, you can only identify all
 25 of the cases which go up to make the outbreak.

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1 LORD HODGE: Yes, I see that point, but getting back to your
 2 earlier point, you said there wasn't "but for", the
 3 insurance law simply goes straight to proximate cause.
 4 But at the time when that was enacted in the
 5 Marine Insurance Act, people would have said, as judges
 6 did say in Reischer v Borwick, it is not sufficient that
 7 it's causa sine qua non, it has to be causa causans. So
 8 what proximate involved was a further requirement,
 9 namely that it wasn't too remote beyond the prior test
 10 of causa sine qua non.
 11 MR EDELMAN: Well, my Lord, that's a question whether
 12 causation really is a mechanical exercise of stage 1 and
 13 stage 2 where "but for" is always your first stop on
 14 your way to causation or whether, once you know your
 15 causation test, you then apply it to the facts and you
 16 apply it to give effect to what it is you are applying
 17 it to. Now —
 18 LORD HODGE: But there you're relying on Lord Hoffmann's
 19 commentary on the Fairchild Enclave which is the
 20 exception rather than the norm.
 21 MR EDELMAN: Well, my Lords, I wasn't, I was — that part of
 22 his judgment wasn't actually to do with the enclave, it
 23 was really saying that the important point is to
 24 identify the appropriate causal test.
 25 LORD HODGE: Yes.

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1 MR EDELMAN: They went on in Fairchild to identify a novel
 2 causation test, but that doesn't affect the principle
 3 which he was setting out which is that one identifies
 4 what the causal test is and then applies it to the facts
 5 and that's what the High Court of Australia said and
 6 what the Court of Appeal adopted in Galoo, trying to
 7 move away from any mechanistic approach to assessing
 8 causation and assessing it on the facts having regard to
 9 the purpose for which you are applying it.
 10 LORD HODGE: Yes.
 11 MR EDELMAN: That's why — and I just wanted to go back to
 12 those solicitors' cases because taking that Travelers v
 13 XYZ case, where there were hundreds of claims being made
 14 against the insured in respect of faulty breast implants
 15 and of the hundreds, maybe about 30% as a rough guess,
 16 I haven't done the maths, off my head a rough guess,
 17 let's say 30%, because it was there or thereabouts, it
 18 was certainly less than 50%, were insured. What the
 19 court did was to select sample cases for trial and there
 20 were four sample cases and costs were incurred defending
 21 those four sample cases, the issue being whether the
 22 implants were defective.
 23 Travelers were obliged — the insurer — to
 24 indemnify the insured against the costs of defending
 25 insured claims. Mr Kealey's application of the

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1 "but for" test was insurance is all about
 2 indemnification of loss and if you would have suffered
 3 the loss even but for the insured contingency, you
 4 cannot recover. Now, that would mean that in that case
 5 Travelers should have been, on Mr Kealey's analysis,
 6 entitled to say "Well, yes, of course the insurance
 7 policy says that you are entitled to an indemnity
 8 against defence costs but you've not suffered any loss
 9 by reason of those insured claims because but for those
 10 insured claims, you would still have been paying the
 11 same costs to defend the uninsured claims".

12 That is the mechanistic application of the
 13 "but for" test if you're assuming, as Mr Kealey was
 14 trying to do, that insurance is all about identifying
 15 a loss that someone has sustained and applying
 16 a "but for" test to that loss. Would you still have
 17 suffered the same loss for which you are claiming
 18 indemnity but for that insured contingency? Having to
 19 defend, in this case, the contingency is having to
 20 defend the insured claim.

21 And it may be that in the realms of tort and
 22 contract, if someone suffered an injury and wanted to
 23 claim damages and you were able to say to them, "Well,
 24 actually, you had a bad back anyway and, yes, my injury
 25 was a cause of the bad back but your back would have

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1 been just as bad as if I hadn't injured you", "but for"
 2 may be helpful. But in insurance when you're insuring
 3 against contingencies and there are two causes, one
 4 insured and one uninsured, both of which are capable of
 5 causing the same loss and that loss is indivisible, in
 6 that case you couldn't divide up the costs that were
 7 referable to the four sample cases, then you have
 8 insurance. And it's because one's dealing with
 9 insurance perhaps is the rationalisation.

10 LORD HODGE: Yes, I see where you're coming from in relation
 11 to the defence costs case and you flagged that up
 12 earlier.

13 MR EDELMAN: Yes.

14 LORD HODGE: But my point was simply that if one looks at
 15 the cases to which you — the other cases to which we
 16 were referred, they were all cases where traditional
 17 "but for" causation worked perfectly well on the facts
 18 in those insurance cases.

19 MR EDELMAN: I know my Lord, Lord Briggs wants to say
 20 something, but can I just answer that point before
 21 I hand over to Lord Briggs.

22 The answer to that is, no, in Silversea, because but
 23 for the government warnings, there would still have been
 24 the terrorist attacks. My Lord remembers the point that
 25 I was making. Whilst the warnings, the insured

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1 warnings, were dependent of course on the attacks having
 2 occurred, the attacks came first.

3 LORD HODGE: That's the interlinked point rather than
 4 interdependent?

5 MR EDELMAN: Yes. So the attacks were an independent
 6 concurrent cause. And the reason why the court allowed
 7 insurance — would have seen that as concurrent cause is
 8 because this is not something wholly extraneous and
 9 independent which would have caused loss anyway, it is
 10 the sort of thing that is being contemplated by the risk
 11 that's being insured. And that's important. That's the
 12 interlinkage. It was explicit in that policy; it's
 13 explicit in this policy when you are covering
 14 notifiable diseases. It's the sort of thing you are
 15 insuring.

16 LORD HODGE: Thank you.

17 MR EDELMAN: My Lord Briggs.

18 LORD BRIGGS: Mr Edelman, I was asking myself why the
 19 Travelers case didn't ring bells with me, and I realised
 20 when I went to look at the paragraph of I think my
 21 judgment to which you referred us this morning, the
 22 reason is that it was common ground —

23 MR EDELMAN: Yes.

24 LORD BRIGGS: — that you couldn't apportion costs between
 25 insured and uninsured claims.

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1 MR EDELMAN: Yes.

2 LORD BRIGGS: And what slightly troubles me, and I can't —
 3 I'm not even sure that common ground ever had to be
 4 explained (inaudible) as it would be the case at all, is
 5 whether costs might be sui generis. I mean, I can quite
 6 see why you're using costs as an example, but I just
 7 wonder whether the origin of the principle that you
 8 can't apportion costs between insured and uninsured
 9 claims is really just a straightforward application of
 10 a proximate (inaudible) cause test or whether it's
 11 sui generis and it's just about costs, because costs is
 12 a separately insured item.

13 MR EDELMAN: Well, that's why, my Lord, when I was — when
 14 I referred to the authorities this morning I made it
 15 plain that the submission that — the reason I was doing
 16 so was to answer the question that Mr Kealey posed in
 17 order to justify his "but for" test being that one has
 18 to ask whether the insured has suffered loss. Would he
 19 have suffered the same loss but for whatever it is —
 20 having to face the insured claims?

21 So, yes, of course, defence costs are always subject
 22 to their own particular insuring clause and they are
 23 special in that sense, but the general principle that
 24 Mr Kealey was resorting to in order to introduce the
 25 "but for" test is a principle that would apply just as

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1 much to that area, because you're still talking about --
 2 it would still be an action for damages for breach of
 3 the indemnity if the insurer refused to indemnify for
 4 defence costs. It's still the same remedy in damages.
 5 You've failed to indemnify me against the loss that
 6 I have sustained through incurring a liability to my
 7 solicitors to pay costs, and it's the incurring of the
 8 liability which is -- it's not the payment of the
 9 solicitors. The loss is that I am now liable to pay my
 10 solicitors' costs. And so that is the loss that you've
 11 sustained. Your financial position is worse off than it
 12 was -- than you were before because of your liability.
 13 And Mr Kealey is saying that is your -- you're claiming
 14 damages for breach of the indemnity, you have to show
 15 that you are worse off as a result, and you're not worse
 16 off if you would have incurred the costs anyway. You'd
 17 have to incur them anyway. You would have been liable
 18 to the solicitors for the uninsured claims. That was
 19 the point that I was making. For that point, the nature
 20 of the insuring provision doesn't matter. And the fact
 21 that there have been issues about apportionment is
 22 because no insurer has ever had the temerity to argue
 23 that they shouldn't be liable at all in such
 24 a situation. They've only ever argued, at most, that
 25 they should be apportioned. Why should I pay all the

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1 costs where only two of the four sample claims were
 2 against me as -- involved me as the insurer?
 3 LORD REED: So I suppose if you're dealing with cover for
 4 business interruption in consequence of any occurrence
 5 of a notifiable disease within a given area, it would
 6 seem surprising if the parties intended that there would
 7 be recovery if there was a single occurrence but no
 8 recovery if there was more than one occurrence because
 9 a "but for" test wouldn't then be satisfied, because
 10 it's in the nature of a notifiable disease that
 11 occurrences are liable to come in more than single
 12 instances.
 13 MR EDELMAN: And, of course, the submission I made before,
 14 that if you're contemplating something up to 25 miles or
 15 even one mile away affecting your business, although the
 16 policy only requires one case, it's necessarily
 17 contemplating that actually if there's something to
 18 interrupt or interfere with your business, it's going to
 19 be an outbreak. And that's necessarily inherent in the
 20 peril that it's contemplating -- at least it's on the
 21 spectrum. Let me put it as low as I possibly could in
 22 my favour: that is on the spectrum of the contemplation
 23 of this clause. And once you are contemplating that,
 24 you must necessarily be contemplating that diseases
 25 spread, as they do, and where the disease outbreak is

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1 and the way in which it spreads will depend on the
 2 particular characteristics of the disease, how quickly
 3 it spreads. It can't have been intended that because --
 4 even if the disease starts within the 25 miles, that
 5 just because it spreads outside and then attracts
 6 broader public authority action, let's say, that
 7 suddenly there is no cover, because the cases within the
 8 area have ceased then to be the proximate cause of the
 9 continuing interruption or interference. It just
 10 doesn't make sense to apply "but for". That's the
 11 interlinkage point that ties in with the Silversea
 12 approach, where you have the attacks which are -- in
 13 that case genuinely the attacks are an independent
 14 cause, they're not interdependent. They are capable on
 15 their own of causing at least a major part of the loss
 16 of revenue.

17 My Lord, yes, I think we've gone over 1 o'clock but
 18 I'm happy to take --

19 LORD LEGGATT: I just wanted to follow up Lord Reed's
 20 question, because it seems to me that the point that
 21 Lord Reed's making there really is if one took "but for"
 22 to its logical extreme, causes within the area would
 23 defeat each other causally.

24 LORD REED: Yes, exactly.

25 LORD LEGGATT: And if that can't be right, then there's no

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1 reason logically why cases outside the area should
 2 causally defeat the cases within the area unless there
 3 were an exclusion in the policy.

4 LORD REED: Yes.

5 LORD LEGGATT: I think that's Lord Reed point.

6 LORD REED: Yes, it was.

7 LORD LEGGATT: I was just puzzling it out.

8 MR EDELMAN: Yes, that's how I understood it and it was
 9 a submission I was making before on the individual
 10 (inaudible).

11 LORD BRIGGS: And that's why, presumably, you submit that
 12 the more natural or workable construction of a disease
 13 clause which only requires one occurrence or outbreak,
 14 or whatever you want to call it, within the area must be
 15 a proviso rather than part of the definition of the
 16 risk?

17 MR EDELMAN: Yes. That's why one then circles back and
 18 says, "Well, I'm looking at the language but actually if
 19 this is how it's supposed to work, how do we make sense
 20 of this construction?" That's how the court's gone
 21 about it. That's why I started off with the nature of
 22 the risk before I introduced this. If these are all the
 23 consequences, what does all this tell you? If they
 24 really intend a "but for", what does it tell you about
 25 the true construction?

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1 LORD REED: Well, as you can see, you've grabbed our
2 attention but if we can tear ourselves away, we'll
3 adjourn now until 2 o'clock.

4 (1.03 pm)

5 (The luncheon adjournment)

6 (2.00 pm)

7 LORD REED: I think we're ready now to resume. Mr Edelman.

8 MR EDELMAN: My Lords, I don't know if there are any further
9 questions arising from the exchanges we had immediately
10 before lunch, but if not can I just summarise where
11 those exchanges might have got us. I will hopefully
12 summarise my submissions on this. Sorry, can I just
13 close a program that might cause some noise on my
14 computer.

15 (Pause)

16 The first, if one looks at the alternatives, the
17 alternatives for which the insurers contend, is that
18 this clause or the clauses like it were intended to
19 apply to the disease risk only where a disease within
20 the relevant policy area was alone the proximate cause
21 of the interruption or interference, and one reaches
22 that conclusion, they say, either as a matter of the
23 true construction of the clauses or the application of
24 the "but for" test.

25 The alternative is that there is cover with the

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1 condition that the disease is present in the relevant
2 policy area and that is all that is required. There are
3 two routes to that. The first is the court's route
4 intended operation through the true construction of the
5 policies that a case of the disease in the relevant
6 policy area is simply a qualified condition.

7 The second is the alternative causation case.
8 Disease in the relevant policy area needs to be a
9 proximate cause of the interruption or interference and
10 the "but for" test is inapplicable, either because it
11 simply doesn't apply to interlinked and concurrent
12 causes and a disease outbreak would necessarily be that,
13 or because, given the nature of the risk insured, it
14 cannot have been intended that the "but for" test should
15 apply.

16 But seeing as the net effect of B is A, B being my
17 concurrent cause, A the construction, that indicates
18 that the construction answer that the court adopted is
19 the correct understanding of the intended operation of
20 the policy. One can follow the long route round through
21 concurrent causes or say, "No, it's not actually
22 a happenstance of what has happened in this case, it is
23 inherent in the disease risk." And if that's really
24 what the parties were contemplating, then rather than
25 going through the legal loopholes of concurrent cause

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1 and the authorities and so on, and say, well, actually
2 if that's where one ends up and that's where the law
3 would end up, isn't it right then to say, well, that
4 must be what the parties intended? If that's the
5 conclusion you reach, obviously.

6 If you reach in conclusion 1, then I lose, and
7 that's — yes, my Lord, Lord Leggatt.

8 LORD LEGGATT: Of course, it's always neater if you can get
9 there by making the policy mean what you want it to, but
10 the problem with the construction route is that you have
11 to grapple with what the policy says rather than rewrite
12 it.

13 MR EDELMAN: But if that is the reality of what is going on
14 because of the disease risk and it's not — usually when
15 one does that one's doing it for a particular situation.
16 One is massaging it for a particular situation.

17 But the construction that I'm advancing is because
18 this is inherent in the nature of the risk. It's going
19 to be the case whenever you get anything that is
20 an outbreak and, as I submitted before lunch, it's only
21 an outbreak that in real terms is going to be causing
22 an interference or an interruption.

23 So they are necessarily contemplating something so
24 serious that despite the fact that you're 25 miles away
25 from it, it interferes with or interrupts your business.

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1 And so that's the submission I make, and so it's
2 inherent in the nature of the risk and that's why when
3 I introduced it I was talking about the nature of the
4 risk, how they could have specified what was required
5 within the policy area in order to make it clear, if
6 they wanted to, that they were focusing on local only
7 and they're not.

8 So then you ask, well, what really is going on? Why
9 is it only something that's symptomatic? Why is it
10 sufficient? Or, in this case, asymptomatic. Why is it
11 sufficient just that someone in the area has caught the
12 disease? Why doesn't it have to be something more, like
13 diagnosis and notification? And then it all starts to
14 fit together. Then you see, that it then makes sense
15 that all they're talking about is a qualifying
16 condition, and this is the way they've expressed it, but
17 that is actually what they mean. Because if they had
18 meant something different, the clause would have looked
19 very different and it would have been requiring
20 something very different to have happened in the policy
21 area.

22 If you were with me either on construction or on
23 concurrent causation, then the question is: do the words
24 "events" — we're on page 852, I hope my Lords have
25 still got that, bundle C {C/13/852} the question: do the

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1 words "events" or "incident" change that conclusion?
 2 The court did not really grapple with our alternative
 3 construction case. They just simply seemed to treat
 4 this clause as being focused on the locality and
 5 therefore we fail. And even if they were right about
 6 that, the local only, the local focus, they should have
 7 gone on to consider our concurrent cause case. So let's
 8 assume for a moment that you're looking at either of my
 9 approaches. Either qualifying condition or concurrent
 10 causation route and then you're asking yourself, is
 11 there anything else in the surrounding bits that
 12 prevents that conclusion?
 13 The two things the court relied on were firstly the
 14 word "events" in 3.2.4 {C/13/852} -- and I've made this
 15 submission before lunch before we digressed -- that
 16 there were -- that the word "events" firstly it's just
 17 descriptive. It's not definitive, it's just a catch-all
 18 word that's been used to refer to everything that
 19 follows. In any event, it's being applied to the
 20 concept of notifiable disease.
 21 But even if it is referring to a particular case,
 22 for the reasons we debated, it can't be requiring that
 23 particular case to be the sole proximate cause. It must
 24 be at least encompassing the prospect of that being
 25 a proximate cause and we say necessarily contemplating

1 because if you've got one case of a notifiable disease
 2 and it's only symptomatic and it's something that's
 3 interrupting the business, there's bound to be more.
 4 So that word of itself doesn't suggest that the
 5 occurrence, if it has to be -- even if it has to be
 6 something specific is then the sole cause. That is
 7 consistent with the fact that Mr Crane accepts, quite
 8 rightly, that this must respond to multiple cases of the
 9 disease. So if occurrence is a single case, it must be
 10 treating concurrent causes as permissible and the word
 11 "events" is not preventing that.
 12 The same applies to the word "incident". Let's look
 13 at how that appears in (h):
 14 "Insurers shall only be liable for loss arising at
 15 those premises which are directly subject to the
 16 incident."
 17 We would submit that the word "incident" is not
 18 being used in any definitional way in relation to (c)
 19 because on the hypothesis, as Mr Crane accepts, this
 20 must encompass necessarily a local outbreak, even on his
 21 case, one wouldn't describe a local outbreak naturally
 22 as an incident, it's an outbreak. But even if one did,
 23 then one is just simply supplanting for the word
 24 "incident" the word "outbreak." One understands the
 25 word "incident" as meaning "outbreak" because, as

1 Mr Crane accepts, this can't be addressing one
 2 particular case. It cannot be doing that exclusively,
 3 it must be contemplating an outbreak.
 4 If it's contemplating an outbreak, there's no reason
 5 again why that word should be contemplating sole
 6 proximate causation as opposed to concurrent cause as
 7 well.
 8 Just finally in relation to (h), just the purpose of
 9 that. The purpose of that clause, " ... those premises
 10 which are directly subject to the incident," would mean
 11 that if, for example, an insured had two sets of
 12 premises and the business overall was interrupted or
 13 interfered with at both premises by virtue of a disease
 14 outbreak within 25 miles of only one of them, only the
 15 interruption or interference at the qualifying premises
 16 could count.
 17 That's all I wanted to say about QBE2. But the
 18 reasons we submit that even if -- we say the court was
 19 wrong in its construction, it should have adopted the
 20 same construction (inaudible) adopted. But even if it
 21 was right that this does require causation of the
 22 disease in the policy area, the words don't go far
 23 enough to require it to be the sole cause and concurrent
 24 cause is enough.
 25 QBE3, just so you've got the policies at 955

1 {C/14/955}. It's got one less reference to incident,
 2 but it's essentially the same clause, but the other
 3 difference is it's got 1 mile. It's not 25 miles but
 4 1 mile.
 5 We say one-mile radius makes no difference, it just
 6 means that the disease outbreak must have a case
 7 somewhat nearer to the insured premises for cover to be
 8 triggered, but the principle is the same as the court
 9 below recognised when dealing with other one-mile
 10 Hiscox 4 policy.
 11 Yes, my Lord, Lord Hamblen.
 12 LORD HAMBLEN: Mr Edelman, just on the one-mile point, what
 13 do you say about paragraph 418 {C/3/149} of the judgment
 14 in terms of (inaudible) difference?
 15 MR EDELMAN: Well, that flows from the conclusion that the
 16 court drew. What they concluded was that this was only
 17 concerned with the local incident having, as they
 18 construed it, the only clause is my reading of that and
 19 because one has to read the judgment as a whole and
 20 they've said it on a number of occasions through the
 21 judgment that each case made its equal contribution to
 22 the government's actions.
 23 So this is only consistent with their understanding
 24 that this could be only the only cause and all they're
 25 saying is it simply cannot be said that any such local

1 incident caused the imposition of the government
 2 restrictions, which is simply reflecting my concession
 3 that if you have all these pins on the board, if you
 4 take one pin out, it's not going to make any difference.
 5 So they do seem to have read it as in effect
 6 something that requires the disease to be only within
 7 the policy area or to be of itself a "but for" cause of
 8 the action and that it obviously fails that test, and
 9 I accept that. That's how I rationalise that.
 10 But what they should have actually done -- what they
 11 did is they seemed to have jumped from the conclusion of
 12 local focus to -- which is an alternative construction
 13 but doesn't exclude my concurrent cause argument -- as
 14 if they were reading the word "only", because you
 15 remember earlier in the judgment one thing they said was
 16 "we can't read the word 'only' in the relevant policy
 17 area" and their conclusion seems to be that they were
 18 reading "only in the relevant policy area" into this
 19 clause. Not feeling the need to read it in but
 20 construing it as if it has that effect. And so you then
 21 have following from that the test: Has this case on its
 22 own been causative of the government action? Answer:
 23 obviously no.
 24 But we don't see that passage as inconsistent with
 25 the concurrent cause case. As I say, reading the

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1 judgment as a whole, it's quite plain what they meant.
 2 That's all I wanted to say about QBE3, and if
 3 I could then move on -- I'm just taking it in order in
 4 which the submissions were made -- to Argenta and
 5 there's not going to be much more to be said about all
 6 of these. If we go to page 314 {C/5/314}, you see the
 7 definition of "Notifiable Human Disease" and it's again:
 8 "illness sustained by any person resulting from
 9 "... infectious or human contagious disease
 10 an outbreak of which ..."
 11 Then it's very similar language, page 317 {C/5/317}:
 12 "any occurrence of a NOTIFIABLE HUMAN DISEASE within
 13 a radius of 25 miles of the PREMISES."
 14 You've got a similar exclusion to the clause that
 15 you saw in the QBE policy, QBE2, in (iii) on the side.
 16 Really, there isn't much to be added on this policy
 17 to what we've discussed before. So unless there's
 18 anything specific on this policy that the court wishes
 19 to put to me, I intend to move on to Amlin1 and that's
 20 at 567, it's tab 10 {C/10/567}.
 21 That's where the clause is:
 22 "Notifiable disease ... following:
 23 "...
 24 "any notifiable disease within a radius of
 25 twenty five miles ..."

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1 Definition of "Notifiable disease" on 559
 2 {C/10/559}. Again, it's:
 3 "Illness sustained by any person resulting from ..."
 4 The only issue on this one which is different from
 5 the others is the use of the word "following" and you'll
 6 remember Mr Kealey referred you to places in the policy
 7 in which that word had been used, he said,
 8 interchangeably with "resulting from". But if you look
 9 on this clause, you'll see there is in the very same
 10 sentence initially the use of "as a result of" and then
 11 the word "following".
 12 The previous clause on the same page uses the phrase
 13 "direct result". This is an insurance policy to be read
 14 by ordinary men and women and when it says
 15 "consequential loss as a result of something following
 16 something else" then we submit that "following" ought to
 17 be given its ordinary meaning which would not be a word
 18 connoting proximate cause as said Hiscox has accepted.
 19 That isn't determinative but it supports the
 20 construction that the court placed on the clause that
 21 this is looking to a qualifying condition. It's a yet
 22 further point in support of that conclusion. My Lord,
 23 Lord Leggatt.
 24 LORD LEGGATT: Presumably you accept that there is to be
 25 some causal link.

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1 MR EDELMAN: Yes.
 2 LORD LEGGATT: It can't just be that one then happens and
 3 then another event happens without any connection?
 4 MR EDELMAN: Yes.
 5 LORD LEGGATT: So it starts to get a bit sophistical,
 6 doesn't it, once we start to argue about different kinds
 7 of causation, if there is such a thing, I mean?
 8 MR EDELMAN: Yes, but if you were to find any distinction
 9 between the policies as on the construction point, then
 10 the use of the word "following" would support the
 11 construction that they were contemplating that actually
 12 this is never going to be the only proximate cause or it
 13 may well not be the only proximate cause. There are
 14 going to be lots of causes and all you've got to show is
 15 that there's some causal connection between the outbreak
 16 in the policy area and what happened and it's consistent
 17 with the nature of the risk. And that's all I say.
 18 LORD LEGGATT: It might be thought to be a rather slender
 19 basis for a judgment if we were to distinguish between
 20 this case and find that we use "resulting from" the
 21 result would have been the opposite.
 22 MR EDELMAN: We have not ever sought to distinguish the
 23 policies but this is perhaps an indication -- I know one
 24 doesn't use words to construe others and I'm not
 25 attempting to do that -- but it is an indication of

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1 a recognition of the nature of the risk. Because if one
 2 looks at the nature of the risk, it's not surprising to
 3 find an insurer using a word like "following" because
 4 otherwise one would think what on earth, in an insuring
 5 clause, is an insurer doing setting a test which is
 6 lower than proximate cause? That would ordinarily be
 7 quite surprising to see something other than proximate
 8 cause and it's why courts usually say, well, there's
 9 a selection of words and they will all in a coverage
 10 clause or an exclusion be construed as proximate cause,
 11 even if in an aggregation clause taking the words
 12 "arising from" for example, they might not be construed
 13 the same way.

14 But here in an insuring clause, they've used the
 15 word "following" and we just say it rather shows the
 16 recognition of the nature of the risk and that's
 17 relevant to all insurers because it shows that this was
 18 something that they ought all to have realised and was
 19 the natural construction of the words.

20 My Lord, Lord Hamblen has gone off screen. Yes,
 21 I just wanted to check that ...

22 That's really all I wanted to say about Amlin 2
 23 because the words again -- it hasn't got the word
 24 "occurrence" in it, but obviously it's got definition of
 25 "notifiable disease is any illness sustained", but it's

1 just following an illness sustained. And again, you
 2 know, you've just got following someone having symptoms
 3 of an illness or being asymptomatic -- sorry, sustained
 4 is asymptomatic, manifested is symptomatic -- but
 5 someone catching the virus and is it really intended
 6 that that should be someone catching, merely catching,
 7 the virus in the relevant policy area should have to be
 8 a "but for" cause or the only cause of what happens?

9 Because Mr Kealey says that even if it's "following"
 10 you still have "but for". So "but for" that person
 11 being infected, that's what he says -- that's how this
 12 clause works and we say that's unrealistic.

13 Amlin 2 at page 645 in tab 11 {C/11/645} at (iii) is
 14 slightly different format but substantially to the same
 15 effect. It's got the same definition of
 16 "Notifiable disease". If you want the definition of
 17 that, it's at {C/11/641}. It's got "Consequential
 18 loss ... following" but it's still got the word
 19 "following", but I have nothing additional to say about
 20 Amlin 2.

21 That brings me on to RSA3, which I think is the last
 22 of the disease clauses, and if we go to page 1237
 23 {C/16/1237} I have taken that before RSA1 because it is
 24 a pure disease clause. You've got again similar
 25 language. We've got "following" again.

1 I make the same submissions at the bottom of 1237.
 2 We have got:
 3 "occurrence of a Notifiable Disease within a radius
 4 of 25 miles ..."

5 And it's again illness sustained, so it's catching
 6 the virus even though you may not have any symptoms.
 7 And I've dealt with that.

8 The only additional point that arises on this policy
 9 is exclusion L, which is on page 1292 {C/16/1292} and
 10 two primary points to be made on that. It says it
 11 doesn't apply to sections 5 and 6, and Mr Turner said it
 12 therefore doesn't apply to the liability coverage. Now,
 13 I may be missing something, I'm the first to admit if
 14 I have, but he seems to have overlooked -- sorry, I'm
 15 just finding the page -- that on page 1201 {C/16/1201}
 16 there is another liability section which is the products
 17 liability section, which is 6(b) which is not referred
 18 to in the title and so it looks as though this does
 19 apply to 6(b). And it's got a different name. I know
 20 it's a subset of -- it's 6(b) rather than 6, but the
 21 title specifies employer's liability and public
 22 liability and makes no reference to 6(b) products
 23 liability. So that submission we submit that it can
 24 only apply to this because there's no other liability
 25 cover is simply wrong.

1 Also, one has to bear in mind that it's not just on
 2 his submission, it wouldn't just be the word "disease"
 3 that has to go, it's also the word "poisoning" because
 4 if we go back to 1237 {C/16/1238}, the definition of
 5 "notifiable disease" includes "food or drink poisoning."
 6 So he has to excise poisoning as well as disease.

7 Now, he accuses us and the court of rewriting the
 8 language of exclusion L, but it is hardly a promising
 9 start for criticism in circumstances where he himself
 10 has to accept that, on his analysis, you have to put
 11 a blue line through "poisoning" and "disease". Of
 12 course we say you don't have to put a blue line through
 13 anything and that's why we say the alternative approach
 14 to construction is correct, because the court's
 15 construction of (b) is correct, and you've seen what the
 16 court has said about that, and we adopt that. But we've
 17 also got our alternative submission under (a) bis which
 18 we maintain and the words "pollution and/or
 19 contamination", as Mr Turner rightly says, hadn't been
 20 defined, but it doesn't lie in his mouth to say that the
 21 heading is of no relevance in circumstances where the
 22 heading is plainly in this instance intended to be
 23 operative, because it defines the sections of the policy
 24 to which the exclusion applies. In any event, even if
 25 it's not part of the policy as such, it informs how one

1 construes pollution and/or contamination because without
 2 reference to those words, the clause is meaningless.
 3 So those in brief are our submissions on
 4 exclusion L. This was the only ground on which the
 5 court below, when considering alternative grounds for
 6 permission to appeal although in the end granted
 7 permission for everything, this was the one ground on
 8 which they expressed the view that they believed that
 9 there was no real prospect of success, but there we are,
 10 RSA have chosen to pursue it.
 11 I'm sure -- and I mean this genuinely -- that there
 12 are very good reasons, I don't mean that in any other
 13 way, but there are very good reasons why RSA is pursuing
 14 this exclusion, but I suspect they don't have much to do
 15 with the merits of the point before the court, but other
 16 commercial considerations.
 17 RSA1, if we can move on to that, unless there's any
 18 more questions on RSA3, and that is at {C/15/1129} and
 19 this is the first of what might be called the hybrid
 20 policies. The language is taking away the additional
 21 element of closure or restrictions, otherwise the
 22 language is very similar to QBE1:
 23 "Loss as a result of.
 24 A) closure or restrictions ... as a result of
 25 a notifiable human disease manifesting itself at the

1 Premises or within a radius of 25 miles."
 2 Obviously here we have, unlike the other policies,
 3 a specified effect that it must result in closure or
 4 restrictions. I will return to that when I get onto my
 5 appeal. I just want to deal with our response to
 6 insurers' appeal at this stage.
 7 The court construed this as simply meaning that the
 8 disease must have manifested itself within the 25-mile
 9 radius, and it did. We say that whatever one thinks of,
 10 what we might say about other forms of wording, this
 11 one, like QBE1 -- yes, my Lord.
 12 LORD LEGGATT: Just for information, is this one "notifiable
 13 human disease" is not in bold. Does that mean that this
 14 time it isn't defined anywhere?
 15 MR EDELMAN: No, it isn't defined.
 16 LORD LEGGATT: Right.
 17 MR EDELMAN: Mr Turner says about this policy, he said,
 18 well, the policy is damage-based, to which I answer:
 19 yes, but this extension isn't. It's premises-based in
 20 the sense that it must result in closure or restrictions
 21 placed on the premises, but within a radius of 25 miles
 22 of the premises isn't premises-based at all. It's just
 23 what this clause is -- it requires something to happen
 24 to the premises, but that's as far as it goes and it
 25 doesn't help you in any way as to the effect of the

1 radius limit.
 2 Now, that's really all I wanted to say about this
 3 aspect of RSA3. Once one's done one or two of them one
 4 has really the answer one way or another to all of them.
 5 If I can now then move on to Hiscox 1 to 4 and start
 6 with Hiscox 1 to 3, which all have a common form of
 7 clause, and the first one -- if I just take it in
 8 Hiscox 1 at page 401 {C/6/401} and this does not have
 9 a vicinity limit. It's a hybrid, in the sense it's
 10 disease plus something else:
 11 "Your inability to use the premises due to
 12 restrictions imposed ..."
 13 I will come back to that on our appeal:
 14 "... by a public authority ..."
 15 So it does here obviously impose -- require specific
 16 public authority action restrictions imposed:
 17 "... during the period of insurance following:
 18 An occurrence of any human infectious or human
 19 contagious disease, an outbreak of which must be
 20 notified to the local authority."
 21 Now, Mr Gaisman in Hiscox's written submissions has
 22 made submissions about the word "occurrence" necessarily
 23 having a local effect, but he did not develop those
 24 submissions orally. You've seen what we've said about
 25 that in relation to -- in answer to that in our case.

1 There just simply isn't any reference to any location
 2 where this disease must occur.
 3 What it does is obviously requires there to be some
 4 causal connection, the use of the word "following"
 5 admitted by Mr Gaisman to be a weaker causal connection
 6 of proximate cause, some causal connection between the
 7 occurrence of the disease and the restrictions imposed
 8 on the premises, that may sometimes mean that it's
 9 local, but it sometimes may mean that it's part of
 10 a wider outbreak, which in a wider outbreak as a whole
 11 causes the restrictions to be imposed.
 12 Given that Mr Gaisman didn't make any further
 13 submissions about that form of policy, which is common
 14 to 1, 2 and 3, there's nothing more that I need to say
 15 about it. I've made my submissions about the
 16 counterfactual as I have for RSA1, but I won't and so
 17 I don't need to repeat those submissions.
 18 Just moving then to Hiscox 4 at page 497 {C/9/497}.
 19 I'm sorry, 498 is where the insuring provisions start
 20 {C/9/498} and the clause itself is at 499 {C/9/499}.
 21 That's the one that was in the main section but
 22 I perhaps look at this first because then Mr Gaisman
 23 wanted to take you to another form. But this was the
 24 main policy form considered by the court, and it's:
 25 "Your inability to use the business premises due to

1 restrictions imposed by public authority ..."
 2 Following exactly the same as 1 to 3, except it's
 3 got the one-mile radius, and we say that doesn't involve
 4 any additional features.
 5 You'll remember, while I'm on this clause, that
 6 Mr Gaisman emphasised that it's described as a public
 7 authority clause. That's because one element of it
 8 obviously is public authority action.
 9 But that doesn't help you with anything. It doesn't
 10 help you with the point we're discussing and it doesn't
 11 help you with the counterfactuals given that even
 12 Mr Gaisman admits that some difficult to comprehend part
 13 of the disease, insofar as it caused the restriction,
 14 goes into the counterfactual. So the fact that it's
 15 described as a public authority clause doesn't take
 16 matters anywhere.
 17 Let's go now to the clause in the policy that he
 18 wanted to take you to, and I'll show you why he wanted
 19 to take you to it, because there's something in that
 20 clause which is missing from this policy and what it is,
 21 it's at {C/22/1559}.
 22 What it relates to is non-damage denial of access.
 23 If you remember, Mr Gaisman took you to that. Now, it's
 24 not actually clear what he's trying to do, whether he's
 25 saying that this is an aid to construction which doesn't

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1 help him on the version of Hiscox 4 without this clause
 2 or whether he's saying use this clause to help you to
 3 construe the clause that's in both forms. But the
 4 clause in both forms must mean the same thing with or
 5 without this additional extension. "Help" means
 6 something different in different policies.
 7 But, in any event it's plain, we submit, that these
 8 were not intended by Hiscox to be interrelated
 9 extensions because otherwise they would necessarily go
 10 together and they have been omitted from other forms of
 11 Hiscox 4.
 12 So what we see from this clause is, firstly, it
 13 refers to an incident within a one-mile radius and the
 14 short point on the relevance of this is that the court
 15 decided that the fact that what had to happen was
 16 described as an incident was inapposite to encompass
 17 a disease risk, but if it did encompass a disease risk
 18 in the sense of a disease incident, it was only
 19 contemplating something which was very specific and
 20 local and not a disease outbreak.
 21 There is nothing in that clause or in the judgment
 22 which provides any support for Hiscox's case on the
 23 Hiscox 4 disease clause which is addressing a risk of a
 24 fundamentally different nature, namely the outbreak of
 25 a notifiable disease. I should have taken you perhaps

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1 to the definition of "notifiable disease" which is on
 2 page 1559, so if you've still got there with the
 3 non-damage denial of access clause {C/22/1559} it's:
 4 "Any human infectious or... contagious disease,
 5 an outbreak of which must be notified to the
 6 local authority."
 7 In this case, therefore, the word "occurrence" is
 8 not linked to the illness sustained by a person, it's
 9 just an occurrence of a disease an outbreak of which
 10 must be notified. So even if you're against me on
 11 "occurrence" meaning "outbreak" in other policies, in
 12 this one it plainly is referring just to an outbreak and
 13 so the submissions I made in relation to other policies
 14 apply here.
 15 There's one point I overlooked and I've got to come
 16 back to on QBE. Sorry, it's again the delay — could my
 17 Lords give me a moment, I've just got to adjust
 18 something on my phone because it goes to sleep and
 19 I need to stop that happening so that I don't miss
 20 messages coming through.
 21 (Pause)
 22 I still find it awkward having a phone rather than
 23 addressing the court, but I'll try and get used to that.
 24 Awkward in the sense I know I shouldn't have a phone,
 25 but I do.

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1 The Arch policy, it's {C/4/227} and you'll see here
 2 this is a prevention of access clause. It's linked to
 3 an emergency and Arch has quite fairly always accepted
 4 that the COVID pandemic was an emergency and was one
 5 which was likely to endanger life. There is no radius
 6 limit.
 7 And now I've realised that there are two points that
 8 I've omitted, so I'm sorry, but I am not getting
 9 stickers before I move on from behind me means that
 10 I sometimes have to come back to things.
 11 I wanted to point out that in Hiscox 4 — and I do
 12 apologise for not doing this all consistently — 1561
 13 {C/22/1561} if we could just go ahead to that in tab 22.
 14 I forgot to make the point that you will see at the foot
 15 of 1561 there is a cancellation and abandonment clause
 16 which appears in many of the policies and certainly both
 17 of the forms of Hiscox 4 that we have and this is
 18 perhaps — I'm sorry, I've got the wrong page. It's —
 19 sorry, it's at the top of the page, yes, "cancellation
 20 and abandonment" at the top of page 1561 and you'll see
 21 that's an extension:
 22 "Unforeseen incident or event which occurs... and is
 23 entirely beyond your control, a promotional event of
 24 your business is necessarily and unavoidably postponed,
 25 abandoned, cancelled or relocated ..."

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1 You'll see at subclause (iii) one of the exclusions
 2 is the postponement, et cetera:
 3 " ... directly or indirectly .
 4 " iii . due to any action taken by any national or
 5 international body or agency directly or indirectly to
 6 control, prevent or suppress any infectious disease."
 7 Now, one of Mr Gaisman's submissions was that no one
 8 would have imagined the government taking actions to
 9 suppress the disease because this had not happened
 10 before and yet he has an exclusion in there for it and
 11 forensic point, perhaps, but if he had wanted to exclude
 12 cover for that sort of thing under the disease clause,
 13 his client, Hiscox, could have done so.
 14 Just in passing, while I return to Hiscox I should
 15 have mentioned that Mr Gaisman did not address any
 16 submissions on grounds 4, 6, 7 and 8. That's the
 17 meaning of "solely and directly", "occurrence",
 18 "interruption" and the application of restriction
 19 imposed to regulation 6.
 20 In circumstances where Mr Gaisman hasn't said
 21 anything orally, I likewise will rest on what we've said
 22 in our respondent's case to that with the comfort of
 23 knowing that Mr Gaisman hasn't addressed it in oral
 24 submissions, but I do understand the pressure of time he
 25 was under, as we are all under, and I hope also the

1 courtesy will be taken of not making a point that
 2 something wasn't addressed when lack of time was
 3 a factor.
 4 My other omission, I'm afraid, was back on QBE2 and
 5 it's page 852 {C/13/852} where it refers to a limit of
 6 indemnity "any one incident."
 7 The word "incident" must, we submit, necessarily,
 8 when it applies to the disease, it can't mean any one
 9 case of the disease because otherwise if there were
 10 multiple cases and it responds, there will be multiple
 11 limits of indemnity. Applying that sensibly to the
 12 clause, it must be any one outbreak and that ties in
 13 with our criticism of the court's reliance on the word
 14 "incident" in the QBE2 and 3 policies.
 15 LORD REED: I think, Mr Edelman, I noticed that point also
 16 when we were looking at one of the earlier clauses. It
 17 may have been QBE2.
 18 MR EDELMAN: My Lord, that was QBE2.
 19 LORD REED: Yes.
 20 MR EDELMAN: So that may -- I've just come back to QBE2 and
 21 that's where it was and I refer to (h) and in my haste
 22 to move on, I forgot to deal with (i). Sorry, it's
 23 entirely my fault, but fortunately I got a message to
 24 remind me.
 25 LORD REED: Yes, yes, but under the disease clause on

1 page 852 {C/13/852} there's a cap --
 2 MR EDELMAN: Yes.
 3 LORD REED: -- there's a cap of £100,000 --
 4 MR EDELMAN: That's it.
 5 LORD REED: -- in respect of any one incident.
 6 MR EDELMAN: Yes, and my submission is that can't be any one
 7 case of the disease.
 8 LORD REED: Yes.
 9 MR EDELMAN: It must mean in relation to (c), when it's
 10 looking at (c), it must mean outbreak and that rather
 11 helps you to understand what "occurrence" must be
 12 getting at.
 13 If one is trying to read this consistently as
 14 a whole, despite the different words to the same effect
 15 broadly that the draftsman has been using, it must be
 16 any outbreak of a notifiable disease, albeit as defined
 17 within a radius of 25 miles of the premises, which then,
 18 as I said, fits in with the court's approach to
 19 construction of other policies which we say it should
 20 have applied to this policy as well, but in any event it
 21 also fits in with our concurrent cause.
 22 My Lords, those were my submissions and I hope I've
 23 covered everything adequately to the court's
 24 satisfaction on our response to the appeals. Obviously,
 25 if there's anything in due course that arises, no doubt

1 the court will ask a question.
 2 I now turn to our appeal -- appeals and we start
 3 with ground 1, which is the pre-trigger downturn point.
 4 One has to see this -- as we pointed out in our appeal
 5 case, one has to take this point into account together
 6 with the mandatory instruction point, because subject to
 7 a concession that Hiscox has made, which has not been
 8 adopted by other insurers, those insurers with this sort
 9 of clause which requires the public authority to do
 10 something which are not expressly couched in terms of
 11 applying to action or advice, are saying that the
 12 restrictions are only relevant restrictions when the
 13 government passed legislation, not when the government
 14 said, as the Prime Minister did, certain types of
 15 premises are to close. Schools will close and it's
 16 right to say that because the schools did close, they
 17 never passed any legislation in relation to schools.
 18 But what they say, even when legislation is passed,
 19 is that, subject to Hiscox's concession, for those
 20 schools -- for those businesses that did close in
 21 response to what the Prime Minister said, that loss of
 22 turnover is then a trend for the purposes of the trends
 23 clause so that when they are forced to close by law in
 24 the sense of being told to close by the government, when
 25 the legislation comes in a few days later and you go to

1 ask yourself "What loss have they suffered?" Well, you
2 say that as at the date they were required to close by
3 legislation, their turnover was zero and so they have
4 suffered no loss as a result of the restriction because
5 they'd already closed because the government had told
6 them to do so, albeit in a non-legally binding way.

7 Now, there are two answers to this, but obviously we
8 want both because the pre-trigger downturn point may
9 have more extensive significance.

10 The two answers are that when the clause itself
11 contemplates something emerging which will trigger
12 an authority response, it is no part of the purpose of
13 a trends clause, when doing the mathematical exercise
14 for the post-trigger period, to take into account the
15 immediate pre-trigger downturn caused by the emergence
16 of the peril.

17 I will develop that in a moment.

18 With our additional argument, but if necessary
19 alternative, being that when policies talk about
20 restrictions imposed or whatever imposed, what they are
21 talking about is something which is mandatory which in
22 a situation of emergency the ordinary member of the
23 public would regard himself or herself as being expected
24 to comply.

25 I will deal with that also in a bit more detail.

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1 But if I can start first with the pre-trigger
2 downturn point which is our first ground of appeal.
3 Just let me make one point abundantly clear: we are not
4 suggesting that prior to all of the ingredients of such
5 composite perils being triggered, any losses incurred
6 are recoverable. It is no part of our case. What our
7 case is: is that when you're doing the quantification
8 exercise for the business interruption loss caused in
9 the post-trigger period, you do not take into account
10 the fact that the ingredient in the peril which it was
11 predicted would give rise to a sequence of events has
12 already started to have an effect on the business before
13 the full house is achieved.

14 Now, there's an element of inconsistency in the
15 court's decision about this, because the court rightly
16 says that — and again it was a sort of simple example,
17 so perhaps it's why it was used by the parties because
18 it was a very simple example of people going to church
19 and putting their money in the tin or the collection
20 box — this is at paragraph 389, but I'm sure my Lords
21 have seen it.

22 In relation to church goes you don't enquire
23 whether but for the closure of the churches the
24 parishioners wouldn't have come anyway because of the
25 pandemic. Because the court rightly said, when you've

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1 got a composite peril, you take everything out. You
2 don't start looking at and say "well, of course, the
3 church was closed, so they couldn't come anyway, but is
4 there a concurrent cause of them not going?" So there
5 are two reasons why they didn't go. They couldn't go
6 because it was closed and they wouldn't have wanted to
7 go anyway because of the disease. Rather like the
8 Silversea case with concurrent cause. The court said,
9 no, when you've got a composite peril, you take all of
10 the ingredients out.

11 You'll have seen that we make it plain that, as
12 I made plain in our answers earlier in the course of my
13 submissions, if one is dealing with a prevention of
14 access clause it is access-related losses. So it
15 doesn't include — I'm not suggesting that because the
16 disease comes out that you're taking disease out and
17 bringing losses in that have nothing to do with access,
18 because actually what we're doing here is we're looking
19 at the trends clause.

20 So the one-off, the quarterly donation, that someone
21 who doesn't actually go to church very much and who
22 maybe goes once a year at Christmas, if that, perhaps in
23 the hope of something better in the afterlife or just to
24 make him or herself feel better, regularly gives
25 a donation to the church. It may be they work on

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1 Sundays and they can't get to church. That person
2 ceasing to give money because the restaurant which he
3 owns or at which he works has gone out of business has
4 nothing to do with access. So the loss of that donation
5 isn't in the equation, and that's reinforcing the point
6 I was making yesterday.

7 What we're talking about is simply the other
8 question of whether parishioners who can't go to church
9 because it's closed are not to be put into
10 a counterfactual on the basis that they might not or
11 would not have gone to church anyway and how on earth
12 would one prove it? That was also the impossibility
13 proof point.

14 But inconsistently with that, the court said you do
15 take into account the fact that some of them may have
16 stopped coming to church before the lockdown, so that if
17 there was a 10% fall in collection income in the week
18 before the church was closed, you take that 10% as your
19 going forward starting point.

20 So, in other words, the church could only recover
21 the difference between 0 and 90% and we say that is
22 actually inconsistent because if you're excluding the
23 disease insofar as it affects access, you should be
24 excluding it for all purposes. And, of course — yes —
25 my Lord, yes.

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1 LORD LEGGATT: This is really the same argument, isn't it,
 2 as you were making yesterday in relation to the
 3 "but for" language in the trends clause that to give it,
 4 you submit, a commercial reading you can't construe
 5 "but for the damage" as confined to just the damage to
 6 the hotel, let's say, in the New Orleans example, it
 7 must include the wider corollaries of that, the other
 8 hurricane damage?
 9 MR EDELMAN: Yes.
 10 LORD LEGGATT: And the only additional point is it doesn't
 11 matter if the other buildings got hit first or
 12 afterwards, it's still part of the wider --
 13 MR EDELMAN: Yes.
 14 LORD LEGGATT: -- incident, if you like.
 15 MR EDELMAN: Yes, absolutely.
 16 LORD LEGGATT: Which you don't take into account in
 17 calculating the loss.
 18 MR EDELMAN: Yes, and it would be like in the hurricane case
 19 if the hotel said, this hurricane could hit, we don't
 20 want to be doing things at the last minute. For the
 21 safety of our guests, we're going to close the hotel
 22 a week -- it wouldn't be a week -- two days before the
 23 hurricane hits and we're going to board up the windows
 24 and then of course the hurricane devastates the hotel,
 25 the boarding up is just like a piece of sticky tape.

1 But do you then say "Oh, well, you were closed for two
 2 days. Your starting point when the damage occurred was
 3 zero?" And we submit it's unreal.
 4 Now, of course if there's some extraneous reason,
 5 nothing to do with the insured contingency and the
 6 income had, unfortunately for the business, gone down to
 7 zero a couple of days before some other incident, then
 8 it's going to be a question of fact as to whether that
 9 zero would have recovered.
 10 That would be an entirely extraneous question, but
 11 it's something entirely different where you have a peril
 12 which the policy itself contemplates. Let's look at the
 13 Orient-Express case, it was a hotel in the Gulf of
 14 Mexico or near the Gulf of Mexico, and hurricanes, I'm
 15 afraid, don't hardly happen. They frequently happen in
 16 the Gulf of Mexico and it's a matter of pot luck where
 17 they're going to hit. People know that and they prepare
 18 for them.
 19 But here there is a disease risk. The policies
 20 actually contemplate, these hybrid policies actually
 21 contemplate, a sequence of events. They contemplate
 22 that the disease or the emergency will arise and
 23 develop. Of course in Arch's case when it refers to
 24 an emergency it could be a sudden emergency. But it
 25 could be a developing emergency. But in the disease

1 clauses it is more self-evidently going to be
 2 a developing picture as recognised by the fact that
 3 Mr Gaisman's A plus B plus C plus D is almost proof of
 4 this point, that you have a sequence of things that the
 5 policy contemplates must happen and they necessarily
 6 contemplate that it's the disease that starts first.
 7 For the court to take the disease out afterwards but
 8 then to give effect to it before, we say is inconsistent
 9 but in any event it is not consistent, as I've
 10 submitted, with the history -- with the commercial
 11 purpose of trends clauses.
 12 It is interesting to note that Hiscox has made that
 13 concession. It's very proper of them to have done so
 14 and I laud them for doing so, although they've not
 15 been -- that's in the context of their resisting --
 16 still resisting any cover under their policies, but they
 17 have at least acknowledged that.
 18 What they haven't done is to explain the basis on
 19 which they are doing it. Mr Gaisman dealt with this at
 20 the consequential hearing and you've probably seen this
 21 in our written case, but did not give a legal
 22 rationalisation for it.
 23 So at the moment it stands as a purely ex gratia
 24 concession as far as insurers are concerned and it's not
 25 right that it should rest on that basis, in particular

1 because the other insurers haven't adopted it.
 2 Everybody needs to know, the loss adjusters need to
 3 know, whether that concession is an ex gratia one or
 4 whether it reflects the legal situation.
 5 Of course it may not be confined to the difference
 6 between the period when the government, for example,
 7 told someone to close and when they actually passed the
 8 legislation requiring them to close, because the social
 9 distancing statement, we say that's enough as well, but
 10 that of course also started on 16 March and there may
 11 have been other downturn effects on the business
 12 surrounding that period which, again, the parties will
 13 need to know whether or not those are to be taken into
 14 account in making this quantification exercise under the
 15 trends clause. And that's where it does arise.
 16 Are you adjusting the income figure for the impact
 17 that this emerging peril had started to have on the
 18 business before it had the full house effects?
 19 LORD REED: Mr Edelman, it strikes me that there may be
 20 an aspect of a case such as the present which is
 21 materially different from a hurricane example.
 22 If the trends clauses are to be interpreted as
 23 meaning that businesses can only recover if they ignore
 24 government advice, issued in the interests of public
 25 safety to cover the period before legislation can be

1 brought into force, then the effect of giving that
 2 reading to the contract is to encourage companies to
 3 behave in a socially irresponsible manner which would
 4 damage their commercial reputations and be contrary to
 5 the public interest .
 6 MR EDELMAN: Yes. I mean, that's quite right, but
 7 unfortunately the insurers' answer to that would be,
 8 well, we're not insuring their public reputation and
 9 that's what their answer would be. We are insuring --
 10 LORD REED: One has to --
 11 MR EDELMAN: Yes.
 12 LORD REED: One has to interpret the contract in a way which
 13 reflects what one could reasonably take to be the
 14 parties' intention .
 15 MR EDELMAN: Yes. Well, that's our primary submission on
 16 ground 2. And perhaps it might help if I -- that is
 17 essentially the point we make. I can't remember if we
 18 gave in our case, but certainly I would draw an analogy
 19 with -- and it may be an extreme analogy -- the Second
 20 World War because the emergency we are facing at the
 21 moment -- I obviously can't compare to what the
 22 population went through in that war -- but there are few
 23 national emergencies that occur in anyone's lifetime and
 24 in that period people would expect themselves and be
 25 expected to comply with things that the government told

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1 them to do for the purposes of public safety without
 2 regard to whether the government had passed legislation
 3 and whether they were legally bound to do so. It was
 4 a matter of social responsibility .
 5 I was going to give him the credit of mentioning
 6 this, but there was -- and I don't usually refer to
 7 newspaper articles -- an article by The Times journalist
 8 Matthew Syed in which he made the point that the
 9 difference between free democratic societies and those
 10 that are not is that free and democratic societies work
 11 on the basis that the population generally -- obviously
 12 there will be exceptions -- but the population generally
 13 is willing to act in a socially responsible way.
 14 It's why, by and large, we don't have an armed
 15 police force. Obviously in exceptional circumstances
 16 the police have to be armed and in certain circumstances
 17 are, but it's because underpinning the way in which free
 18 democratic societies operate is that they can rely on
 19 the population as the price of your freedom that you
 20 will act in a socially responsible way when you need to.
 21 LORD REED: Perhaps if one reduces it to a more mundane
 22 level, if, say, an infestation of vermin were discovered
 23 in the kitchen of a takeaway on a Saturday evening and
 24 the statutory order closing the premises couldn't be
 25 issued until the Monday, it would be extraordinary, it

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1 seems to me, if the contract effectively required the
 2 business to carry on trading on the Sunday in order to
 3 be able to recover compensation.
 4 MR EDELMAN: And it would be all the more extraordinary --
 5 we agree with that, my Lord, we've made similar points
 6 in our case -- it would be more extraordinary if
 7 an order was made on the Monday, it stayed open, despite
 8 the rats, until the Monday, the order was made on the
 9 Monday and he then closed and then it transpired that
 10 the person who issued the order didn't have the
 11 authority to do so and it was of no legal effect .
 12 And the error maybe was never corrected or not
 13 corrected until the Friday. Or, if the local authority
 14 representative said on the Saturday "As soon as the
 15 office is open again and my boss is back, but he's not
 16 back till Wednesday, you're going to get an order
 17 closing you". And the restaurateur then closed.
 18 But of course in our case the government didn't
 19 threaten legislation . The statements don't say "If you
 20 don't do this, we're going to make you do it". They
 21 relied on public compliance. We get to the position,
 22 the rather ridiculous position, in my submission, in
 23 relation to schools, if you're going to strictly apply
 24 insurers' case, that for some reason --
 25 I mean, the government never bothered passing the

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1 legislation and so you have the case which is now relied
 2 on by insurers where someone applied for judicial review
 3 in respect of the government action closing schools and
 4 the court rightly said "Well, actually there's nothing
 5 to judicially review here because they never passed
 6 a law". And insurers say, well, that shows you that it
 7 wasn't legally binding. Yes, but the schools closed
 8 because there was an emergency and they knew, as
 9 a matter of public safety, that as a school they just
 10 had to close.
 11 But insurers are saying, as a matter of legal
 12 entitlement, putting aside ex gratia concessions, they
 13 are saying as a matter of legal entitlement they are
 14 entitled to take into account this downturn. So really
 15 there are two answers, but both may be right. It's not
 16 an either/or, both may be right. Yes, my Lord,
 17 Lord Leggatt.
 18 LORD LEGGATT: But they have slightly different consequences
 19 anyway, don't they? Because in order to claim, as
 20 opposed to not have your loss discounted, but to claim
 21 loss for a certain few days at least you have to be
 22 right on the --
 23 MR EDELMAN: Yes.
 24 LORD LEGGATT: -- on the imposed point.
 25 MR EDELMAN: Yes, yes. The imposed does help with days of

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1 cover. That's quite right. With some of these policies
 2 the limits are so low that one or the other may make
 3 a difference, but it is important actually to backdate
 4 the cover. So my Lord is right to correct me.

5 LORD LEGGATT: The main point made against you, or what
 6 I take to be the main point made against you, on the
 7 imposed is that it introduces difficult questions of
 8 degree and if something is expressed, let's say we could
 9 accept that if the Prime Minister says you must do this,
 10 well, that's an instruction, but what about if you are
 11 advised to do this? One has to then make quite fine
 12 judgments sometimes because obviously there is some
 13 advice which is genuinely intended to be guidance, which
 14 isn't compulsory.

15 MR EDELMAN: Yes. We have tried to formulate a test for
 16 that which is simply: Is it mandatory? Not in legal
 17 effect, but is what is being said mandatory? This is
 18 what you are expected to do.

19 LORD LEGGATT: You've lost me on that point. Are you
 20 inviting this court to make what's basically a judgment
 21 of fact and degree, or how are you inviting us to deal
 22 with the point if we think you're right in principle?

23 MR EDELMAN: Well, my Lord, we have identified the various
 24 statements that the Prime Minister made, the various
 25 announcements that were made, and the ones we have

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1 relied on are the ones that we say were all expressed in
 2 mandatory terms. Even if they said "We are asking
 3 people to do this now", that wasn't just saying "If you
 4 want, we are asking you to do it if you would like to,
 5 if not, don't. This is what we want you to do." The
 6 fact that something is expressed politely doesn't mean
 7 that it wasn't intended to be mandatory that this is
 8 what was being expected of the population. And so —

9 LORD LEGGATT: What about things expressed in terms of
 10 "Well, don't do it unless you have to"?

11 MR EDELMAN: Well, if it's don't go to work unless it is
 12 necessary to do so, then that is doing — it is exactly,
 13 it's mandatory; unless you have to go to work, you
 14 shouldn't be going to work.

15 LORD LEGGATT: Whose judgment is that as to whether it's
 16 necessary or not?

17 MR EDELMAN: Well, that would obviously be on the individual
 18 facts, but it perhaps doesn't apply so much for when
 19 there's restrictions imposed on premises, closure or
 20 restrictions imposed, save to the extent that you can
 21 say that people weren't allowed to go to work for that
 22 purpose. But it would be relevant, for example, to
 23 office staff, professional staff, us, as well, because
 24 if the government said "Don't go to work unless you have
 25 to" and then solicitors and barristers worked from home

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1 and it may be in some cases not as productive and there
 2 may be some additional expenditure which is incurred,
 3 because all the IT systems have to be upgraded, there
 4 may be some cancellation of cases and so on, people have
 5 complied with this and saying "Well, it's" — that will
 6 be for the loss assessor to say, "Well, actually you
 7 stayed at home when in fact you were entitled to go to
 8 work". That would be on the adjustment process. There
 9 would be a dispute about it and if the parties couldn't
 10 agree then they would go to arbitration or to court.

11 But whether it was necessary for somebody to go to
 12 work is an objective test which can readily be applied.
 13 You ask what do you do? Why couldn't you have done it
 14 at home?

15 Yes, my Lord.

16 LORD BRIGGS: I think, Mr Edelman, that the same issue
 17 arises even when it does become legally binding because,
 18 for example, regulation 6 says you must stay at home
 19 unless you've got a reasonable excuse.

20 MR EDELMAN: Yes.

21 LORD BRIGGS: Ultimately that will come down to
 22 a fact-intensive analysis of excuses unless they are
 23 listed —

24 MR EDELMAN: Yes.

25 LORD BRIGGS: — as, as it were, deemed reasonable excuses.

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1 MR EDELMAN: Yes, quite. I mean, often they are — and it's
 2 not unfamiliar in all areas of law to have matters which
 3 are elements of judgment and even in one case that on
 4 aggregation clauses, often the language is deliberately
 5 left vague and general, so that it's adaptable to all
 6 circumstances. In this case that I can't remember what
 7 the constitution of the panel was, but I'm sure one or
 8 more members of this panel dealt with it, the
 9 *AIG v Woodman* case on the fact that the solicitor's
 10 minimum terms used the term "related", that matters or
 11 transactions had to be related.

12 Now, "related" is a flexible term. The court below
 13 had tried to impose some constraints on it because they
 14 thought it was too vague and general and the
 15 Supreme Court, this court, said no, it's there because
 16 judgment needs to be exercised on the facts of each
 17 case. That's also an insurance policy and that can be
 18 an issue on which many millions can turn because it
 19 depends whether the primary layer insurer pays repeated
 20 £3 million limits or whether the excess layer pays,
 21 let's say, a £7 million limit and whether the insured,
 22 the policyholder, gets a £10 million indemnity or
 23 multiple £3 million indemnities, and it's something that
 24 would have to be assessed on the facts of each case. So
 25 that's really no impediment. It's something that

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1 insurance is well used to.
 2 So it's specifically an insurance fact, so that's
 3 an insurance provision which is, as the court said in
 4 Scott v Copenhagen Re, often these clauses are
 5 deliberately kept general so that they are adaptable to
 6 the facts. So it's not an impediment at all.
 7 So that's what we would invite the court to do.
 8 This is really jumping ahead to ground 2. I will go
 9 through the language of the clauses specifically, but
 10 what we would like the court to do on ground 2 is simply
 11 to say that all of those statements on which we've
 12 relied, they are all mandatory instructions from the
 13 government and they all qualify under the various
 14 clauses and so the indemnity should start from that
 15 date.
 16 As I said, we've also got the pre-trigger downturn
 17 clause, it doesn't really -- I've made the inconsistency
 18 point and it doesn't bear much repetition. I think
 19 we've made it in our case and the point is as it is.
 20 I would only perhaps give -- I gave the hurricane
 21 example -- the Cockermouth example again.
 22 It might help illustrate the point because the same
 23 would apply to floodwaters if, in the Cockermouth
 24 example, the floodwaters rose slowly rather than
 25 suddenly and they rose, as can happen in these flood

1 cases, if they're more remote from an immediate source
 2 of flooding. Say that the waters rose for a day or two
 3 and a shop on the highest ground wasn't affected and
 4 because it was the only shop open it did a roaring
 5 trade, because maybe to one side of the property there
 6 was flooding but to the other side people could get to
 7 it.
 8 Then the floodwaters rose and it was inundated with
 9 water. Is loss of turnover to be assessed by
 10 reference to those one or two days of roaring trade or
 11 can the loss adjuster say "No, come off it, that's the
 12 effect of the very flood which has caused damage and
 13 that's not the true picture of your business. The true
 14 picture of your business is what it was before this
 15 floodwater ever appeared".
 16 That answer by the loss adjuster would, we say, be
 17 absolutely the correct answer and it would be doing
 18 exactly what trends clauses are supposed to do. It
 19 shuts out, therefore, it shuts out the windfall as well.
 20 Someone might say "Well, all these other fools they all
 21 closed but the government hadn't passed legislation, or
 22 the government hadn't made us close, so I stayed open
 23 and this is my trade up until the government passed
 24 legislation making me close and so, thank you, I'll have
 25 my claim adjusted for being the only irresponsible bar

1 owner who had people pouring out of his bar desperate
 2 for a drink before lockdown".
 3 So it gets rid of those cases as well as providing
 4 a more level playing field for those who did shut.
 5 Now, the mandatory instructions -- sorry, I'm just
 6 getting a note, if I might just look at that.
 7 (Pause)
 8 Can I just refer to a passage in Amlin's case at
 9 {B/15/604}. This is moving on to the mandatory
 10 instructions point and it's a reference to the House of
 11 Commons House of Lords Joint Committee on Human Rights
 12 Briefing Paper. It included the following passage:
 13 "The Regulations put the new measures announced by
 14 the Prime Minister... on a statutory footing, making
 15 them legally enforceable from 1 pm on Thursday 26th. It
 16 is important to note that prior to this, there was no
 17 legal basis for the announced restrictions on movement
 18 and gatherings. We have more general concerns about the
 19 recent disconnect between the laws that are in force and
 20 therefore binding, and 'announcements', 'directions' or
 21 'instructions' from Government which have no legal
 22 force, but which are communicated in such a way as to
 23 appear binding."
 24 Now, this is cited against us, but we say it
 25 supports us because this confirms that these were

1 statements which were made to appear binding. That's
 2 not to suggest that the Prime Minister was misleading
 3 people into believing there was legal force when there
 4 wasn't. They were expressed in a way that were
 5 directive, were mandatory.
 6 We don't take issue with Lord Sumption's analysis,
 7 which is heavily relied on by insurers, who did, as one
 8 would expect, a very learned exposition on why what the
 9 government has said wasn't legally binding. Right, yes,
 10 we accept all that, but it's nothing to the point.
 11 Absolutely nothing to the point.
 12 That is not how we would want our society to
 13 operate. We don't live freely and happily together
 14 simply by doing the minimum necessary to obey the law.
 15 If we all did that it would not be a pleasant place to
 16 live. We do what is necessary in order to function
 17 together freely but also for social protection, to
 18 protect each other, and this is an example of that.
 19 So the one concession that we have on the legal
 20 enforceability issue was in relation to RSA4 and in the
 21 judgment, because the court found against us on this,
 22 the court at paragraph 303 {C/3/120} which is on
 23 page 120. They say:
 24 "In our judgment, there will only have been
 25 an 'enforced closure' ... if all or a part of the

1 premises was closed under legal compulsion. We agree
 2 with RSA that this would extend to closure which either
 3 is or is legally capable of being enforced. By 'legally
 4 capable of being enforced' we include a case of where
 5 a governmental authority or agency or local authority
 6 directs that particular premises should be closed, and
 7 states that if they are not closed then a compulsory
 8 order for their closure will be obtained. But we
 9 consider that in that type of situation, there would
 10 have to be a clear direction by an authority which has
 11 the power to close that they should be shut failing
 12 which a compulsory order will be obtained."
 13 So they say that it's only enough if there is
 14 an explicit threat of legal enforcement, but they at
 15 least say that there doesn't have to be legal
 16 enforcement.
 17 But we say why is it necessary to go so far? What
 18 if the threat is implicit in the sense that a reasonable
 19 person would understand that, regardless of whether or
 20 not what he's being asked to do has legal force, if
 21 there is disregard of what they have been asked to do,
 22 something will have to be done about it and that
 23 something will necessarily have to be legal force.
 24 It's not difficult to work out that if, after the
 25 Prime Minister's statement on 16 March or his subsequent

1 statements people had generally ignored what he had
 2 asked them to do, there were two alternatives. Either
 3 the government shrugs its shoulders and says "Oh well,
 4 we tried. Let's have everybody die of COVID". Or the
 5 government would have to do something to force people to
 6 do it, but the court seems to be saying unless the
 7 government actually threatened people "Unless you do
 8 this, we're going to pass a law that's going to make it
 9 a criminal offence for you to do it" it's not enough.
 10 But if the reasonable person would understand that
 11 if people don't obey this sort of thing, it's so serious
 12 that the government is going to have to do something
 13 about it legally, then that should satisfy as
 14 an implicit threat alone.
 15 So we say even without this threat point we should
 16 succeed in a time of great national emergency and the
 17 government tells people "This is what you must do for
 18 everybody's benefit" and protecting the NHS, which was
 19 part of the slogan, it was so that beds would be
 20 available so that people who were ill, which could have
 21 been any of us, would be able to be treated if
 22 necessary. It was for the benefit of the public as
 23 a whole and that should be enough.
 24 But if there is an implicit threat necessary, it's
 25 an obvious one.

1 LORD REED: But the way it was put, Mr Edelman, by the
 2 government in its written guidance to businesses, I'm
 3 looking, for example, at the guidance issued on 23 March
 4 which is in -- it's {C/38/1849} and you'll see under
 5 "Compliance" --
 6 MR EDELMAN: Yes.
 7 LORD REED: Under "Compliance" it says:
 8 "Everyone is instructed to comply with the rules
 9 issued by the government ..."
 10 Now, that's the sort of way of putting it that
 11 occasions criticism from Lord Sumption lovers, but then
 12 it goes on to say:
 13 "As of 2pm on 21 ... closures on the original list
 14 from 20 March are now enforceable by law ..."
 15 So the Prime Minister had announced the original
 16 list of businesses on 20 March that had to close, cafés
 17 and restaurants and the like, so they're saying that's
 18 now enforceable.
 19 "The government will extend the law... to include
 20 the new list of premises for closure."
 21 That was a list that the Prime Minister had
 22 announced on the 23rd which included a variety of
 23 premises like gyms, and so on, that hadn't been included
 24 previously. So they're not saying "Do it or else we'll
 25 follow it up with law", they're saying "We're making the

1 announcement, we expect you to comply".
 2 MR EDELMAN: Yes.
 3 LORD REED: The law follows --
 4 MR EDELMAN: Yes.
 5 LORD REED: -- a day later, or however many days later it
 6 may take, presumably because of the lag between the
 7 adoption of a policy on the advice they're being given
 8 and getting that drafted in a way which can be given
 9 effect as a Statutory Instrument.
 10 MR EDELMAN: My Lord, yes. It's just like the
 11 local authority officer who comes down and says, "I'm
 12 going to close you" and has to go back to the office and
 13 go through, quite rightly, various procedures before the
 14 draconian step of actually issuing a closure order can
 15 be issued.
 16 LORD REED: Yes.
 17 MR EDELMAN: But it's, we submit, not necessary for
 18 something as extreme as -- even as extreme as that to be
 19 promulgated. But the fact that the court below was not
 20 prepared to accede even to these announcements
 21 satisfying the clauses we say is demonstrably wrong.
 22 But let's go to the Prime Minister's announcement on
 23 16 March. It starts at 1782 in tab 29 {C/29/1782}.
 24 This was the first really critical announcement of
 25 a series of announcements that were made, and he

1 explains the purpose of what he's doing, which brings
 2 home to everyone that this really is a national
 3 emergency. In the trial below, this sort of thing was
 4 likened by Mr Kealey to the government telling us all
 5 that we must eat five pieces of fruit a day: it's just
 6 advice and we can take it or leave it. But that, no
 7 doubt Mr Kealey's usual frivolity, is rather
 8 understating the importance of this.
 9 And it says {C/29/1783}:
 10 "Last week we asked everyone to stay at home if you
 11 had one of two key symptoms ...
 12 "Today, we need ..."
 13 This is on the top of 1783:
 14 "Today, we need to go further ..."
 15 And he explains why:
 16 "... without drastic action, cases could double
 17 every 5 or 6 days."
 18 So what he's explaining is that drastic action is
 19 necessary, and he then goes on to spell out what the
 20 drastic action is. What insurers rely on is the fact
 21 that he was only asking people to do something. So
 22 first we need to ask you to insure and --
 23 LORD REED: But this advice wasn't directed towards
 24 businesses. That came, I think, for the first time on
 25 the 20th.

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1 MR EDELMAN: That's right. But this obviously began to
 2 affect businesses and we ought to look at the clauses
 3 because it starts to affect people's movement. It does
 4 affect businesses because he says --
 5 LORD REED: Oh yes.
 6 MR EDELMAN: "... second, now is the time for everyone to
 7 stop non-essential contact with others and to stop all
 8 unnecessary travel.
 9 "We need people to start working from home where
 10 they possibly can. And you should avoid pubs, clubs,
 11 theatres and other social venues."
 12 So there are things that do start affecting
 13 businesses. This is in mandatory language, and it's
 14 explained in circumstances where there may be in other
 15 cases dispute at the margins but there can be no doubt,
 16 whatever people may have thought about the rights and
 17 wrongs of it, in terms of whether it was necessary or
 18 not, although people may -- it has now proved to be
 19 necessary -- to have been necessary, but there's no
 20 doubt that there's not much room to manoeuvre as to
 21 whether this was something that was intended to be
 22 mandatory. It may have been polite. Of course it was
 23 polite, because if you're rude to people, they're not
 24 going to do what you want them to do. It was expressed
 25 as politely -- sorry, Lord Leggatt.

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1 LORD LEGGATT: Are you suggesting, for example, that if
 2 a business is a pub that this constitutes a restriction
 3 imposed on its ability to open?
 4 MR EDELMAN: This would qualify -- if there was a prevention
 5 of access clause, we would say that people were being
 6 told not to go there.
 7 LORD LEGGATT: But do you contend that that amounts -- we
 8 can look at the wording -- but to inability to use the
 9 premises because of a government restriction if you're
 10 the pub owner?
 11 MR EDELMAN: Yes, yes. How can you use it if people aren't
 12 supposed to go there?
 13 LORD LEGGATT: Well, they can, they just -- I mean, I think
 14 it would be hard to read this as saying nobody must go
 15 to a pub.
 16 MR EDELMAN: Well, it does say:
 17 "... you should avoid pubs, clubs, theatres and
 18 other such social venues."
 19 It is difficult to imagine, my Lords, how that could
 20 be clearer. Now, whether it amounts --
 21 LORD REED: The announcement on the 20th is clearer. It
 22 says {C/33/1815}:
 23 "We are collectively telling ... pubs ... to close
 24 tonight ..."
 25 MR EDELMAN: Yes.

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1 LORD REED: "... and not to open tomorrow."
 2 MR EDELMAN: Yes. It may depend on the language of the
 3 clause. If the clause requires closure, then obviously
 4 that didn't happen until the 20th, obviously. And then
 5 all you have is the fact that there will have been
 6 a downturn prior to the 20th because of what the
 7 government was saying. You then have my pre-trigger
 8 downturn point: that if you have a closure which is
 9 caused by a disease or an emergency in the clause that
 10 you don't take into account the downturn in revenue that
 11 occurred in the lead-up to the 20th.
 12 LORD LEGGATT: But that goes much wider, because I take it,
 13 on your case, you ignore all the downturn that was
 14 already happening because people were frightened of
 15 going out to pubs because they knew about the virus,
 16 regardless of what the Prime Minister was saying.
 17 MR EDELMAN: Oh yes, yes. But that's not difficult because
 18 what actually -- it does vary from policy to policy, but
 19 what many policies do, on the adjustment machinery, is
 20 if, let's say, the pub was closed from March till June
 21 and had no revenue, you would then go back under most
 22 clauses -- not all of them but under any of them you
 23 would go back to March -- to June the previous year and
 24 say, "Well, that was your revenue last year. I'm now
 25 going to treat that as your starting notional loss of

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1 turnover. Is there any reason for us to adjust that
 2 figure for trends and circumstances?"
 3 LORD LEGGATT: No, I don't have a difficulty with how you go
 4 about that.
 5 MR EDELMAN: So that's why you then say, "Well, oh, yes, now
 6 I see that in the two weeks before the 20th your
 7 downturn — or your three weeks before the 20th, your
 8 revenue was much lower" and say, "Well, yes, because of
 9 COVID, so that downturn is not relevant. My March to
 10 June 2019 figures are the figures you should be taking,
 11 because if you take the first half of March 2020, those
 12 are artificially depressed by the very COVID crisis
 13 which is an element of the insured peril".
 14 LORD LEGGATT: I think we've moved away, because my question
 15 was really directed towards your restrictions imposed —
 16 MR EDELMAN: Yes, I'm sorry.
 17 LORD LEGGATT: — and I was just having some difficulty with
 18 if we were to — suppose we were in your favour
 19 generally on the point, if we were to rule that the PM's
 20 statement was mandatory that might be a bit too broad
 21 without looking at particular language of particular
 22 parts of it and looking at particular effects, or how
 23 they might be reasonably understood by particular
 24 business sectors.
 25 MR EDELMAN: Well, my Lords, I need only say that those

1 businesses which were referred to in — for those
 2 businesses to which reference was made in that statement
 3 and then the parties will be able to work it out. What
 4 we hope is that if my Lords are in my favour in any of
 5 these respects, then, once we get your judgment in
 6 principle, we can then formulate some declarations. But
 7 if you would say that if a business was told to close in
 8 the statement of March 20, that would be a restriction
 9 imposed or an enforced closure for the purposes of the
 10 clause, and then the parties can apply that because the
 11 statement says what it says. The court doesn't need
 12 then itself to work out who was and who wasn't
 13 mentioned. The parties will be able to do that for you.
 14 It's really the point of principle — and this test
 15 case was all about points of principle, leaving the
 16 facts of individual cases to be dealt with by adjustment
 17 and, if necessary, dispute resolution process — was to
 18 remove roadblocks to settlement. One of the roadblocks
 19 was this question as to whether closure before
 20 legislation is, firstly, outside policy cover and,
 21 secondly, is something that a loss adjuster can use in
 22 adjusting the claim, in the sense that you come down to
 23 zero before the policy was triggered. Those are the two
 24 critical points. It's really resolving those points of
 25 principle that's necessary.

1 It might then be helpful if I started — I've
 2 probably said enough that I want to generally and it may
 3 just be that we now have to go through some of the
 4 individual clauses just to see if there are any words or
 5 variance on those. We should perhaps start with Arch,
 6 just simply doing it alphabetically with this one.
 7 That's at C — there's a ground 3 appeal as well as to
 8 what's meant by "prevention of access". So perhaps
 9 I should introduce that topic, which is ground 3, and
 10 then go to some particular clauses and deal with it.
 11 I was just going to show you the leading
 12 prevention of access wording just so I can introduce
 13 this ground. It may be a useful way of spending the
 14 remaining time today.
 15 In Arch, the disease clause at page 227 {C/4/227},
 16 this is ground 3 of our appeal:
 17 "Prevention of access ... due to the actions or
 18 advice of a government or ... authority ..."
 19 You'll see that no issue arises on the first point
 20 because it's "actions or advice", which actually we say
 21 supports our case, because it rather demonstrates here
 22 an insurer contemplating that the government may act
 23 through advice. So we say this is strong contextual
 24 support — and I'm not using one word to construe what
 25 other policies mean, but it's just showing what is in

1 the contemplation of an insurer that the government does
 2 act and authorities do act on advice.
 3 But the real focus of this is on prevention of
 4 access. The critical point is whether there is
 5 prevention of access only as the court found when all
 6 access — access for all purposes is prevented or
 7 whether there is prevention of access if access for
 8 a particular purpose or by a particular class of persons
 9 is prevented even if access for other purposes by other
 10 classes of persons is permitted.
 11 So the example that we gave below and I give again:
 12 is there a prevention of access to a road to those who
 13 want to use the road as a through route if it's closed
 14 save for use by residents and those visiting them?
 15 Assume that there's a policeman there controlling who
 16 goes down the road to ensure that only those falling
 17 within the permitted class are allowed past the barrier.
 18 Is there a prevention of access to the road? Let's
 19 assume that some way far up the road, which really needs
 20 to be driven to, is a shop which relies on through
 21 trade, people driving through, to stop at it. Insurers
 22 say "no" because — and the court says "no" because
 23 residents and their visitors can still use it.
 24 We would say on the ordinary use of language and the
 25 ordinary understanding of the term, there most certainly

1 is a prevention of access to those other than residents
2 or those visiting them. There is a prevention of access
3 because certain classes of person are prevented from
4 getting there. Some classes are not, but some are. It
5 wouldn't be a misuse of language to say there is
6 a prevention of access to the road, because one class of
7 users cannot use it.

8 This has very real significance for shops and
9 restaurants, for example, because insurers say there is
10 no prevention of access if customers are not allowed to
11 go to a shop and the shop owner is not allowed to let
12 them in to buy in-store, but the shop staff can still go
13 into the shop to process mail orders. So they say,
14 "Well, the fact that the staff can go in and process
15 mail orders shows that there is no prevention of
16 access."

17 Similarly, insurers saying no prevention of access
18 if customers are not allowed to enter a restaurant to
19 dine in the restaurant and the owner is not allowed to
20 let them in to dine in the restaurant, but the kitchen
21 staff can come in to cook takeaway meals and maybe
22 people can come and collect takeaway meals. Is there
23 a prevention of access? Insurers say: no, because the
24 staff can come in and people can come in and collect
25 a takeaway. We say there is because there is

1 a prevention of access for a particular class of persons
2 for a particular purpose. People who want to dine in
3 the restaurant are not allowed to go in. That's what we
4 mean by "partial prevention".

5 Carried to its extreme, insurers' case would be that
6 if a road leading to a restaurant was closed to
7 everyone, preventing access by all customers for all
8 purposes, but at the back of the property there was
9 a way in that enabled kitchen staff to get to the
10 kitchen to cook takeaway meals, carry them to a nearby
11 open road for someone to collect them then, so that they
12 could be delivered, there would be no prevention of
13 access satisfying the clause. That, as we understand
14 it, is what insurers' case is.

15 Now, we say, and I'll come to the individual
16 wordings, but we will be seeing Arch's and -- yes, my
17 Lord, Lord Hamblen.

18 LORD HAMBLÉN: So if you're right on ground 1, do any of
19 these points on grounds 2 and 3 matter?

20 MR EDELMAN: Oh yes, this one is a complete answer because
21 they're saying that when there is -- if, for example,
22 a restaurant is ordered to close for dine-in but had
23 an existing takeaway -- they say if it didn't have
24 a takeaway restaurant, it's fine because then it --
25 maybe, no, not on prevention of access; it's inability

1 to use.

2 On prevention of access, they're saying once it's
3 told to close as a restaurant, because it can still open
4 as a takeaway and the staff can still go to it to cook
5 meals, there is no prevention of access. So there's no
6 cover. The policy isn't triggered at all.

7 LORD HAMBLÉN: At all? I see, yes.

8 MR EDELMAN: And so that is fundamental. I think my
9 takeaway meal example may have to go -- well, I was
10 going to say that simply means that there's no --
11 I think I did finish that. I've seen it's 4 o'clock, so
12 perhaps if I pause there and resume tomorrow, I am well
13 up to where I wanted to be.

14 LORD REED: Yes. Well, if any of us has a takeaway meal, we
15 may pay more attention than we normally would as to how
16 it's all organised.

17 MR EDELMAN: My Lord may reflect on the fact that having
18 a takeaway meal is preventing an insured from getting
19 any indemnity under the policy that has a prevention of
20 access clause.

21 LORD REED: Well, thank you very much, Mr Edelman. We'll
22 adjourn now and resume at 10.30 am tomorrow morning.
23 (4.01 pm)

24 (The court adjourned until 10.30 am
25 on Thursday, 19 November 2020)

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