Appeal No. 2020/0179-0184

IN THE SUPREME COURT OF THE UNITED KINGDOM

ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (QBD)
FINANCIAL LIST
FINANCIAL MARKETS TEST CASE SCHEME

CLAIM NO: FL-2020-000018

Neutral Citation: [2020] EWHC 2448 (Comm)

BETWEEN:

(1) ARCH INSURANCE (UK) LIMITED
(2) ARGENTA SYNDICATE MANAGEMENT LIMITED
(3) HISCOX INSURANCE COMPANY LIMITED
(4) MS AMLIN UNDERWRITING LIMITED
(5) QBE UK LIMITED
(6) ROYAL & SUN ALLIANCE INSURANCE PLC

Appellants

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

-and-

HISCOX ACTION GROUP

Intervener

WRITTEN CASE OF THE FOURTH APPELLANT (MS AMLIN)

INTRODUCTION

1. MS Amlin (the Fourth Appellant – hereafter "**MSA**") promised to indemnify against:[1]

> **[1] Consequential loss [2]** as a result of interruption of or interference with the **business** … at the **premises [3]** following … **[4]** any **notifiable disease** [i.e. illness sustained by any person resulting from a notifiable disease] **[5]** within a radius of twenty five miles of the **premises**.

[1] With numbers in square brackets added for ease of understanding.

References to the hearing bundle are in the format **{bundle/tab/page}**.

2. Shorn of all detail, the essential facts (and assumptions) are these:

2.1 COVID-19 was made notifiable by law on 5 March 2020 in England and on 6 March 2020 in Wales. It is a human contagious disease.[2]

2.2 On 21 and 26 March 2020, national Regulations were made by the Secretary of State which interrupted or interfered with the insured businesses of many of MSA's insureds at their respective insured premises. The degree of the interruption or interference and its financial impact differed depending on the nature of the insured business.

2.3 If one assumes that an insured can prove that there has been a case or have been cases of illness sustained by a person or persons after 5 March 2020[3] resulting from COVID-19 within a radius of twenty five miles of the **premises** ("**the relevant area**"),[4] that case or those cases made no difference to, and did not cause, the Government's action.

2.4 The Government would have acted in exactly the same way irrespective of any case or cases of illness that the insured might be able to prove had been sustained in the relevant area.[5]

2.5 The Insured would still have suffered exactly the same interruption of or interference with the insured business, if the proved case or cases of illness from COVID-19 within the relevant area had not occurred.

3. The question of law is simply this: **Is MSA liable on its promise to indemnify?**

4. Flaux LJ and Butcher J have held that the answer to this question is yes.

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2 See 2 October 2020 declarations Order, para 1 **{C/1/2}**.

3 Or 6 March 2020 in Wales.

4 As to such proof, see 2 October 2020 declarations Order, para 6 **{C/1/2}**.

5 See FCA Reply, para 52 **{D/18/1591}**; FCA skeleton argument for trial, para 241 **{D/20/1604}**; Judgment, [81] **{C/3/57}**.

5. With respect, that answer was wrong. The correct answer is this:

5.1 MSA's promise was only to indemnify against the business interruption ("**BI**") consequences at the insured premises of the proved case or cases of illness from COVID-19 within 25 miles of those premises.

5.2 MSA did not promise to indemnify against the BI consequences at the insured premises <u>of a global pandemic or national epidemic</u> of cases of illness from COVID-19, provided it is possible (even, for example, years later) to prove that any one person sustained illness from COVID-19 within 25 miles of those premises.

5.3 MSA did not promise to indemnify against the BI consequences at the insured premises <u>of the Government's response to a global pandemic or national epidemic</u> of cases of illness from COVID-19, provided it is possible (even, for example, years later) to prove that any one person sustained illness from COVID-19 within 25 miles of those premises.

5.4 The word *"following"* imported a causal connection between (i) the business interruption at the insured premises and (ii) the proved case or cases of illness from COVID-19 within 25 miles of those premises.[6]

5.5 There is no causal connection, and none can be established, if the business interruption (and its consequences) at the insured premises would always have occurred but for (so, irrespective of) any proved cases of COVID-19 within 25 miles of those premises. The business interruption did not result from, and was not the consequence of, the proved case or cases within the relevant area.

5.6 The counterfactual applicable to the assessment of an insured's loss is to reverse the proved case(s) of illness sustained resulting from COVID-19 within the 25 mile radius of the insured premises, and not COVID-19 (or any of its consequences) anywhere else.

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6 This is common ground: see Amended Particulars of Claim ("**APoC**"), para 60 **{D/16/1584}**.

6. Formally, these points are raised through three grounds of appeal each of which is addressed below.

THE POLICIES AND THE CLAUSES

7. This appeal concerns two of the three sample MSA policies considered below, namely **MSA1** and **MSA2** – the Judgment, [175] **{C/3/88}**. These policies provide standard property damage BI cover and limited non-damage extensions, including a "disease clause".[7]

MSA1

8. **MSA1** is a Commercial Combined Policy, providing BI cover in section 6 (Judgment, [176] **{C/3/89}**). Section 6 included, as one of the "Additional covers", a disease clause in the following terms ("**MSA1 Clause 6**"):

> "***We*** *will pay* ***you*** *for:*
>
> *...*
>
> ***6. Notifiable disease, vermin, defective sanitary arrangements, murder and suicide***
>
> ***Consequential loss*** *as a result of interruption of or interference with the* ***business*** *carried on by* ***you*** *at the* ***premises*** *following:*
>
> *a) i. any* ***notifiable disease*** *at the* ***premises*** *or due to food or drink supplied from the* ***premises****;*
>
> *ii. any discovery of an organism at the* ***premises*** *likely to result in the event of a* ***notifiable disease****;*
>
> *iii. any* ***notifiable disease*** *within a radius of twenty five miles of the* ***premises****;*
>
> *b) the discovery of vermin or pests at the* ***premises*** *which causes restrictions on the use of the* ***premises*** *on the order of the competent local authority;*
>
> *c) any accident causing defects in the drains or other sanitary arrangements at the* ***premises*** *which causes restrictions on the use of the* ***premises*** *on the order of the competent local authority; or*

[7] A convenient shorthand used by the Court to refer to the clauses identified in the Judgment at [80] **{C/3/57}**.

[(d)] *any murder or suicide at the **premises**.*

*The maximum **we** will pay for any one loss will not exceed **£100,000**.*

Conditions

*1. For the purpose of this additional cover **premises** will mean only those locations stated in the **premises** definition. If this policy includes an additional cover which deems **damage** at other locations to be insured, the additional cover will not apply to this additional cover.*

*2. **We** will not be liable for any costs incurred in the cleaning, repair, replacement, recall or checking of property.*

*3. **We** will only be liable for loss arising at those **premises** which are directly affected by the loss, discovery or accident. …*"

9. Notifiable disease is defined in MSA1 as follows (see [180] **{C/3/90}**):

> **"*Notifiable disease***
>
> *Illness sustained by any person resulting from:*
>
> *a) food or drink poisoning; or*
>
> *b) any human infectious or contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS)) an outbreak of which the competent local authority has stipulated will be notified to them*."

10. Other relevant clauses and definitions are set out at [177]-[181] of the Judgment **{C/3/89-91}**.

MSA2

11. The lead wording under MSA2 is a Retail Insurance Policy (see [182] **{C/3/91}**). The MSA2 category of policies also included a Leisure Policy and an Office and Surgery policy. The Court addressed only the lead Retail wording, where all three are materially identical.

12. The disease clause in MSA2 (including the definition of "notifiable disease") is materially identical to that in MSA1, save that the cover in respect of "*Notifiable disease, vermin, defective sanitary arrangements, murder and suicide*" in clause 6 (referred to hereafter as MSA2 Clause 6) is expressed as follows:

> "***We** will pay **you** for:*
>
> *…*
>
> *6. … **consequential loss** following:*

a) …

*iii. any **notifiable disease** within a radius of twenty five miles of the premises…"*

INTRODUCTION TO GROUNDS ONE AND TWO

13. Grounds 1 and 2 set out MSA's case separately on two component parts of the disease clause: "*following*" (**ground 2**) "*any **notifiable disease** within a radius of twenty five miles…*" (**ground 1**).

14. There is a danger in considering each ground (and each part of the clause) in isolation from the other. They are a single provision and fall to be construed as a unitary whole.

15. With both parts taken together, the coverage question boils down to this: **was there interruption of or interference with the insured business caused by (*viz. "following"*) proved cases of illness sustained resulting from COVID-19 within a radius of twenty-five miles of the insured premises?**

16. The question falls to be framed in this way, because that is the language of the parties' contract. The reasonable person would have understood that, for interruption of or interference with the insured business to be indemnified under that notifiable disease coverage, it had to be the consequence of those cases of illness sustained resulting from COVID-19 within twenty-five miles of those premises. The requirement of ordinary cause and effect is there simply to be read.

17. It did not matter that there might be disease beyond the agreed radius: that disease is irrelevant. The coverage is not concerned with disease in the abstract (whether within or beyond that radius); and the coverage is not concerned with specific cases of illness sustained from that disease beyond the agreed radius. What matters is only cases of illness sustained by individuals resulting from that disease specifically within a radius of twenty-five miles of the affected insured premises, and that the business interruption or interference at the insured premises followed those cases.

18. On grounds one and two, MSA's case involves the following essential propositions:

18.1 "*following*" is not the language of proviso but the language of causation. It requires a relationship between events whereby one (business interruption of or interference with the business at insured premises) is the result of the other (cases of illness sustained resulting from COVID-19 within twenty-five miles of those insured premises). It imports, at the least, a factual 'but for' test applied to *"any **notifiable disease** within a radius of twenty five miles…*".

18.2 "***notifiable disease***" is defined as individual cases of illness sustained resulting from COVID-19. So defined, the phrase is not apt to refer to an epidemic, because it requires proof of individual cases within the required radius (and therefore a distinction between those cases within the radius, which are relevant to the cover, and those cases outside the radius, which are not).

(a) The issue is not approached correctly unless and until the definition of "***notifiable disease***" is plugged into the clause. Without the definition, the temptation exists of reading "***notifiable disease***" as if those words were undefined and could refer to the nationwide epidemic.

(b) Once the definition is imported, this approach becomes impossible. The definition cannot be ignored.

18.3 The phrase "*within 25 miles*" is not a mere trigger requirement operating as a gateway to unrestricted disease cover. It is of substantive effect.

(a) MSA did not insure against the business interruption / interference consequences at an insured premises of a national epidemic provided one case of the disease could be proved to have been sustained within a twenty-five mile radius of those premises. That is obviously not the language of the clause, and equally obviously not its proper meaning.

(b) The fallacy of construing the phrase "*within a radius of twenty five miles*" as a mere trigger or proviso to epidemic cover is exposed by reading it together with the definition of "***notifiable disease***" and in the context of the coverage provision as a whole.

(c) Properly understood, the radial requirement delineates the geographical boundary of the scope of the proved cases of disease, and thereby the business interruption consequences of notifiable disease which MSA was prepared to insure.

19. MSA submits that, contrary to the conclusion of the Court below, the correct answer to the coverage question (namely, whether on the facts presented to the Court there was business interruption in any case caused by (*viz. "following"*) proved cases of illness sustained resulting from COVID-19 within a radius of twenty-five miles of the insured premises) is no.

THE FIRST GROUND: The Court was wrong in its construction of the phrase "… *any **notifiable disease** within a radius of twenty five miles of the **Premises**"*

20. The Court erred in law in concluding that:

20.1 "… *the essence of the fortuity covered is the Notifiable Disease, which has come near, rather than specific local occurrences of the disease.*" – Judgment [102] **{C/3/67}**[8]; and

20.2 The MSA disease clauses provide indemnity against all the business interruption consequences at the insured premises of COVID-19 anywhere and everywhere in the UK (both within and outside the relevant area), provided merely that the Insured can prove an instance of COVID-19 within the relevant area – Judgment, [102] -[110], [113], [532] **{C/3/67-69, 179}**.

21. The Court ought to have concluded, with reference to this phrase, that the MSA disease clauses only provide cover for the business interruption consequences at the insured premises of the illness sustained by a person or persons within the relevant area from COVID-19.

22. The Court's construction was wrong because:

[8] This was said in relation to the insured peril in the RSA3 disease clause, with reference to which the Court developed its analysis of this sort of disease clause wording. At [189], [191], the Court made clear that its conclusions in relation to RSA3 apply to the MSA disease clauses **{C/3/93}**.

22.1 It is contrary to the wording of the MSA disease clauses – specifically, (i) the phrase "*within a radius of twenty five miles…*" and (ii) the definition of "***notifiable disease***".

22.2 It is not supported by the matters supposedly within the parties' contemplation at the time of contracting.

22.3 It is not justified by the alleged anomalous results of MSA's construction.

The wording (i)*: "within a radius of twenty five miles…"*

23. The wording of the MSA disease clauses does not support the Court's conclusion, contrary to what is said at Judgment, [102] **{C/3/67}**.

24. Proof (even years later) of a single case of COVID-19 within 25 miles does not magically trigger a right to recover for the business interruption consequences of the entire epidemic as from the date when that single case can be proved to have occurred (see [113], [532] of the Judgment **{C/3/69, 179}**).

24.1 The MSA disease clauses do not state that there is cover for business interruption consequences at the insured premises following

(a) "*any **notifiable disease** provided that there was a case of it within a radius of 25 miles of the insured premises*"; or

(b) "*any **notifiable disease** anywhere as from the date when the insured proves a case of the **notifiable disease** within a radius of 25 miles of the insured premises to have occurred*".

24.2 Properly construed, the 25 mile radius requirement was an inherent and express delineation of and restriction on the scope of the disease cover being provided.

25. The word "*within*" imports a meaning and significance which the Court failed to recognise.

25.1 The word communicates:

(a) first, that the "***notifiable disease***" (as defined) has to be inside the identified limit or boundary, and

(b) secondly, that the position outside the identified limit or boundary is contractually irrelevant. This is consistent with the dictionary meaning of "*within*": see Shorter Oxford English Dictionary (6th Ed., 2007), meaning A1 ("*In the interior, on the inner side; inside internally… In the limits of a region…*") and B1 ("*Inside or not beyond the limits or boundaries of (a place); inside (specified boundaries) …*" **{F/74}**

25.2 It is inconsistent with the word "*within*" to construe the clause as providing cover for the effects at the insured premises of COVID-19 occurring nationally, not only within the 25 mile radius but also outside it (Judgment, [110], [532] **{C/3/69, 179}**). There is simply no textual justification for such a reading of the MSA disease clauses.

25.3 The Court's reading is also inconsistent with the Court's construction of the prevention of access clause in MSA2 (Judgment, [420] **{C/3/150}**), which was materially identical to the Hiscox NDDA clause (Judgment, [439] **{C/3/156}**).

(a) In relation to those clauses, the Court held that the "*further geographical restriction that the incident occurs "within a one mile radius of the insured premises" or "within the vicinity of the insured premises" seems to us to confirm that this clause is intended to cover local incidents…*" (at [404] **{C/3/146}**).

(b) MSA agrees and submits that the same is true of the MSA disease clauses: they only provide cover for the effects of "***notifiable disease***" (as defined) occurring within the agreed geographical restriction of a 25 mile radius of the insured premises.

(c) The logic is the same, whether the delineation of cover is a radius of one mile (immediately local) or 25 miles (more distantly local; but not national).

26. Nowhere in the MSA disease clauses is there language to support a construction that there is cover for "*the effects of COVID-19 both within the particular radius and outside it*" (Judgment, [532] **{C/3/179}**).

26.1 The MSA disease clauses do not refer to providing cover for notifiable disease generally and/or notifiable disease outside the radius of 25 miles.

26.2 The Court's construction drives a coach and horses through the linguistic boundary by which the parties defined and delimited the scope of the insured peril. It moves the boundary from 25 miles to the national border.

26.3 The Court prayed in aid the language of the MSA clauses as being not "*expressly confined to cases where the interruption has resulted only from the instance(s) of a Notifiable Disease within the 25 mile radius, as opposed to other instances elsewhere*" (at [102] **{C/3/67}**). However, the clause did not need to read "*any notifiable disease only within a radius of twenty five miles of the premises*" in order to delineate the cover as being for the business interruption consequences of the instances of illness from notifiable disease within the 25 mile radius.[9] The scope and extent of cover were determined and bounded by the plain effect of the words in fact used in the MSA disease clauses, for the reasons given and the additional reasons which follow.

The wording (ii): "***notifiable disease***" (as defined)

27. "***notifiable disease***" was expressly defined as "*illness sustained by any person resulting from any human infectious or contagious disease … an outbreak of which the competent local authority has stipulated will be notified to them*" – MSA1: **{C/10/559}**; MSA2: **{C/11/641}**.

28. As the Court held, an insured can show that a person sustained illness resulting from COVID-19 even if such person was not diagnosed with COVID-19 (Judgment, [93], [196] **{C/3/64, 94}**).

29. This definition does not simply require proof of the presence of COVID-19 in general terms, still less the presence of SARS-CoV-2.[10] Rather, the definition requires proof of specific cases of illness sustained by individual people within the 25 mile radius of the

[9] As the Court itself recognised at [66]: "*Arguments which rely on what is absent from the drafting of the contract are to be treated with caution and in many cases provide little assistance: Netherlands v Deutsche Bank AG [2019] EWCA Civ 771 at [59].*" **{C/3/53}**

[10] i.e. the novel coronavirus which causes COVID-19: see Agreed Facts 2 **{C/44/1909}**.

insured premises. In other words, the MSA disease clauses only insure the effects of proved cases of COVID-19 sustained within the 25 mile radius.

29.1 The Court wrongly proceeded without regard to this definition and its ingredients: see [196] ("*The MSA "disease clauses" are not expressed in terms of the "occurrence" or "manifestation" of the disease, but rather in terms of there being the disease within the 25 mile radius*" **{C/3/94}**).

29.2 From that mistaken assumption, the Court then wrongly concluded that the absence of any reference to an "occurrence" (or "manifestation") in the MSA disease clauses made it "*relatively straightforward to conclude that the cover extended to the effects of a notifiable disease if and from the time it is within the 25 mile radius and is not limited to the specific effects only of the instances of the disease within the radius*" (Judgment, [196] **{C/3/94}**).

29.3 However, the presence of the definition of "***notifiable disease***" precluded this conclusion: its effect is to provide an indemnity only for the business interruption consequences at the insured premises of specific cases of specific illness sustained by specific persons. That is the significance of the wording of the definition.

30. Consequently, the Court erred in failing to give effect to the specific words used in the definition of "***notifiable disease***" in construing the MSA disease clauses.

31. When the "***notifiable disease***" definition is read together with the 25 mile radius requirement, MSA submits that the wording creates a circumscribed form of cover specifically relating to the business interruption effects at the insured premises of proved cases of COVID-19 sustained within the 25 mile radius of the insured premises. It is cover only for matters occurring at a particular time, in a particular place and in a particular way. It is materially equivalent to "event" cover.[11]

[11] Which the Court held, in the context of QBE 2 and 3, was confined to the results of relatively local cases (see Judgment, [231]-[237] **{C/3/103-104}**).

32. MSA's case is supported by the immediate contractual context of the MSA disease clauses in which the cover for "*any notifiable disease within a radius of twenty five miles of the premises*" appears.

32.1 Each of the other limbs of the same coverage clause insures against events occurring at the insured premises (e.g. "notifiable disease" at the premises or the discovery of vermin or pests at the premises: see Judgment, [178] **{C/3/89}**).

32.2 The entire tenor of the insuring agreement as a whole is, therefore, circumscribed, defined-area cover.

32.3 It would be surprising, to say the least, if those clauses were the vehicle chosen by the parties for providing widespread pandemic cover. The language of the MSA disease clauses does not support such a conclusion.

The admissible matrix and its significance

33. The Court also regarded as "*fundamental*" to its conclusion (see [102] **{C/3/67}**) various matters which it considered to be within the reasonable contemplation of the parties at the time of contracting (see Judgment, [103]-[104]). These matters include:

33.1 The notification scheme in respect of notifiable diseases under the Public Health (Control of Disease) Act 1984 ("**the 1984 Act**") and the Health Protection (Notification) Regulations 2010 ("**the 2010 Regulations**") made under the 1984 Act.

33.2 The nature of the diseases specified in Schedule 1 to the 2010 Regulations as being notifiable. The Court described this as follows at [104] **{C/3/67}**:

> "While there is clearly a spectrum of diseases within the category of Notifiable Diseases, it includes diseases which are capable of widespread dissemination, such as SARS… It is in the nature of human infectious and contagious diseases that they may spread in highly complicated, often difficult to predict, and what might be described as "fluid", patterns."

33.3 That the list of diseases in Schedule 1 to the 2010 Regulations included some which might attract something more than a purely local response, from authorities which are not merely local authorities.

33.4 That there might be relevant actions of public authorities in response to notifiable diseases which affect a wide area.

33.5 Authorities might take action in relation to the outbreak of a notifiable disease as a whole and not to particular parts of an outbreak, and would be most unlikely to take action which had any regard to whether cases fell within or outside a line 25 miles away from any particular insured premises.

34. These matters were relied upon by the Court as support for its conclusion that the MSA disease clauses insure all effects on the insured's business of a notifiable disease capable of widespread dissemination, including public authority response to a widespread (indeed, nationwide) epidemic extending very far beyond the 25 mile radius.

35. The Court was wrong to assume that whatever matters *may* have been in the parties' contemplation must also have been insured. It was impermissible to use the factual matrix to rewrite the language the parties chose to use against the background of it:

35.1 If the parties contemplated the risk of epidemic or wide area disease as much as narrow area, localised disease (and public authority response in each case), it is the parties' language which must resolve the issue of how much of the contemplated risk the insurer was prepared to insure.

35.2 It is clear from the words of the MSA disease clauses that the agreed intention of the parties was to impose a specific 25 mile radius limitation.

35.3 The function of the parties' contemplation of epidemic or wide area disease is <u>not</u> to support a conclusion that the insurer <u>was</u> prepared to insure the risk of it, but to support precisely the opposite conclusion: against the background of the risk of wide area disease, the inclusion of words of circumscription and boundary were to delineate and distinguish the risk the insurer was prepared to run, from the risk the insurer was not prepared to run.

35.4 The words "*within a radius of twenty five miles*" make perfect sense against the factual matrix and must be given effect according to their plain sense.

35.5 It is no answer to say that the generosity of the 25 mile radius requirement indicates a willingness to insure epidemic or wide area disease. It indicates a willingness to insure the effects of disease within a wider area than would a one mile radius requirement. But it indicates an agreement to confine the agreed area to specific boundaries and to restrict the indemnity to the effects of the disease within that agreed area. To describe the area as "generous", or to infer from its size that wide area disease must have been contemplated, does not support a conclusion that there is insurance for the business interruption effects of nationwide epidemic disease.

36. In short, the issue is not what the parties contemplated, but what effect the language of their contract has. The Court's construction of the MSA disease clause gives no effect to the phrase "*within a radius of twenty five miles of the premises*". The Court's construction converts that phrase into something it is not (*viz.* a mere trigger) and thereby converts MSA's promise into an indemnity for *all* the effects of an epidemic or pandemic regardless of the agreed 25 mile radius restriction: see the Court's express conclusions to this effect at [110], [112], [532] **{C/3/69, 179}**. That is an impermissible construction of the words of the MSA disease clauses.

The alleged anomalies of MSA's construction do not justify the Court's construction

37. The Court was, at least in part, driven to its conclusion on the MSA disease clauses by what it saw as the "*highly anomalous*" consequences of the insurer's construction (see [105]-[107] **{C/3/68}**). These so-called "*highly anomalous*" consequences provide no basis for overturning the language of the parties' agreement.

38. Against a background where the parties may be taken to have contemplated both localised, narrow area disease and widespread epidemic disease, the parties chose to agree a simplistic 25 mile limit to the scope of the cover.

39. The limit was introduced in the form of a line – literally: a boundary line representing a circle having a radius of 25 miles from the insured premises. The so-called "*highly anomalous result*" outlined in the Judgment at [105] is nothing of the sort. It is a statement of the obvious: at the margins, some situations will fall inside the line and other situations will fall outside it. There is nothing surprising or unusual about that. The

insured has agreed to take the risk of situations falling outside the line, just as much as the insurer has agreed to take the risk of situations falling inside it. The mere fact that a case just outside the line is little different (in nature or in geography) from a situation just inside the line is no reason to overturn the parties' bargain and to replace it with a different bargain in which there is no line at all.

40. An appeal to wide area epidemic disease does not produce an anomalous result (let alone a highly anomalous result) either. It is merely a different example of something else which is outside the scope of the much narrower, defined-area risk which the insurer agreed to run.

41. In any event, as the Court below recognised (Judgment, [108] **{C/3/68}**), the FCA's construction also produces anomalous (and many would say the most highly anomalous) results – not least the postcode lottery whereby the insured's entire cover hinges on the fluke of a single person with COVID-19 happening to wander (however briefly) into the relevant contractual area even if unknown to the insured or the government or anyone else at the time.

41.1 Take, for example, the Isles of Scilly (where insureds of MSA are in fact located).

41.2 The Isles of Scilly did not have a single case of COVID-19 prior to September 2020, and therefore (by virtue of its location) there was no case of COVID-19 within a 25 mile radius of any insured premises located on the Isles of Scilly.

41.3 The Isles of Scilly were nevertheless subject to the English legislation imposed in March 2020 and MSA's insureds located on the Isles of Scilly will have suffered significant business interruption consequences from the effects of the legislation.

41.4 On the FCA's construction, those insureds can recover upon mere proof that a trawler sailed within 25 miles of the insured premises and, aboard the trawler, was a single fisherperson with COVID-19 even if undiagnosed.

41.5 On the FCA's construction, this would be sufficient to trigger the cover in full and enable the insured to recover for all the business interruption consequences of the epidemic, even though the single case on the trawler (i) was unknown to the insured at the time, (ii) was unknown to the government at the time (by virtue of

not having been diagnosed), (iii) had nothing to do with the imposition of the legislation which caused the business interruption consequences to be suffered by the insured, and therefore (iv) was causatively totally irrelevant.

41.6 Nevertheless, the Court accepted that such a magic (albeit undiagnosed) single case was the gateway to full recovery and that this is what the parties objectively intended and agreed.

41.7 If appropriate (as to which, see below), MSA submits that, as anomalies go, there are few which rise higher. MSA also submits that this anomalous approach is simply inconsistent with a clause which was plainly intended to insure against the consequences (and only against the consequences) of the proved case(s) of illness sustained within a 25 mile radius of the insured premises resulting from COVID-19.

42. The fallacy of the Court's approach can also be tested by reference to the separate cover in MSA1 Clause 6 and MSA2 Clause 6 for the business interruption consequences of *"**notifiable disease** at the **premises**"* (MSA1: **{C/10/567}**; MSA2: **{C/11/645}**). The logic of the Court's reasoning is that once the proviso of "***notifiable disease** at the **premises***" is met by proof (even years later) of a single (undiagnosed) case of COVID-19 at the insured premises, the insured would recover for all loss caused by the national COVID-19 epidemic, and even possibly the global pandemic. This would clearly be contrary to the parties' intentions in agreeing narrow cover for the business interruption consequences caused by notifiable disease (as defined) at the insured premises. Indeed, once there was one case of disease (whether at the premises or within the 25 mile radius), there would be no practical difference in the scope of cover between a limb which insures "***notifiable disease** at the **premises***" and one which insures "***notifiable disease** within a radius of twenty five miles of the **premises***". This is another significant anomaly.

43. MSA submits that the issue is not: whose construction produces the greatest anomaly or the largest number of anomalies? This would be an impermissible approach to the parties' bargain, turning the construction exercise into a competition about whose anomalies are the biggest and whose anomalies are the most realistic (neither of which

admits of any objective answer, not to mention the lack of competition criteria for resolving any conflicts between size and realism).

44. MSA submits that the issue is, rather: what does the language of the parties' contract, construed against its matrix, show that the parties agreed?

45. The answer is clear: the parties agreed to contract for circumscribed disease cover, delimited by drawing a circular line.

46. Difficulties and anomalies, at least at the margins, are then inherent in their bargain, because they have chosen a relatively blunt and unsophisticated instrument to define the ambit of the contractual promise. But any difficulties at the margins which might exist (i) could cut either way (as the parties would have appreciated at the time of contracting), (ii) are often theoretical rather than real, and (iii) must not be allowed to operate as the conclusionary tail wagging the contractual dog.

47. In any event, the advantage of drawing a straightforward (if circular) line is that, away from the margins – and therefore in the vast majority of cases, the insurer's promise is clear. If there is a localised outbreak of any ***notifiable disease***, with localised measures that inflict business interruption consequences on the insured's business at the insured premises, there is cover.

48. For these reasons, MSA submits that there is no warrant or justification or rationale for converting the phrase "***notifiable disease*** *within a radius of twenty five miles*" from a limiting phrase, focused on actual proved cases of illness sustained, into a mere trigger or proviso that operates as the gateway to cover for all the consequences of nationwide disease.

THE SECOND GROUND: THE COURT WAS WRONG IN ITS CONSTRUCTION OF "*following*"

49. The focus of ground 1 (above) ("*any* ***notifiable disease*** *within a radius of twenty five miles…"*) is the core of the coverage provision. Of essential importance is then the language the parties used to establish the nature and degree of the required connection between the core of the coverage and the business interruption loss.

50. The necessary connection is embodied in a single word: "*following*". MSA agreed to indemnify against loss resulting from interruption of or interference with the business ***following*** "*any* ***notifiable disease*** *within a radius of twenty five miles…"*[12]

51. The Court's second error of law concerned its treatment of the essential connecting word "*following*" (see Judgment, [94]-[95], [111]-[112], [193]-[195] **{C/3/64-65, 69, 93}**).

51.1 The Court wrongly concluded that the required causal connection between the business interruption loss (on the one hand) and the proved cases of COVID-19 within the 25 mile radius (on the other hand) was established notwithstanding (as the FCA all but admitted)[13] that the business interruption loss would still have been suffered but for (i.e. completely irrespective of) the proved cases of COVID-19 within the 25 mile radius. This conclusion was wrong whether "*following*" imported a "*looser causal connection than proximate cause*" (Judgment, [95], [111], [194] **{C/3/65, 69, 93}**) or imported a proximate cause requirement.

51.2 The Court reached its conclusion by concluding that the required causal connection was established:

(a) by "*the occurrence of a case of the disease within the radius if that occurrence was part of a wider picture which dictated the response of the authorities and the public which itself led to the business interruption or interference*"; or

(b) (if "*following*" imports proximate causation) on the basis that "*the proximate cause of the business interruption is the Notifiable Disease of which the individual outbreaks form indivisible parts.*" (Judgment, [111], see also [532] **{C/3/69, 179}**); or

(c) regardless of any 'but for' test (Judgment, [194] **{C/3/93}**); or

(d) by concluding, in the alternative, that each individual occurrence of COVID-19 in the UK was a separate but equally effective proximate cause of the

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12 This same causal connector was also used in MSA1 Clause 1 Action of competent authorities clause which was also considered by the Court: see clause at [419] **{C/3/150}**.

13 See FCA Reply, para 52 **{D/18/1591}**; FCA skeleton argument for trial, para 241 **{D/20/1604}**; Judgment, [81] **{C/3/57}**.

government action and the loss caused to insureds (Judgment, [112], [533] **{C/3/69, 179}**).

51.3 The Court should have concluded (i) that the causal connector "*following*" required at least the application of a factual (i.e. 'but for') causation test, and (ii) that cases of "*illness sustained by any person resulting from*" COVID-19 within the 25 mile radius of the insured premises were neither a factual nor proximate cause of the interruption of and/or interference with the insured's business.

52. In outline, MSA's case is as follows:

52.1 It is common ground that "*following*" imports a causal connection.[14]

52.2 The basic, fundamental, threshold test for any factual causation inquiry is the 'but for' test. X cannot be a cause of Y if Y would in any event have occurred irrespective of – but for – X.

52.3 Having agreed, by the use of the word "following", that there has to be a causal connection, the parties imported (at the very least) the basic 'but for' test of cause and effect.

52.4 The purpose of importing the basic test of cause and effect was to determine and agree which business interruption losses were sufficiently causally connected to the "***notifiable disease*** *within a twenty five mile radius*" to be indemnifiable under the disease clause.

52.5 Against a background of (i) the general law, (ii) its general requirement of factual causation in the contractual context, and (iii) the absence of any contrary agreement in the policy wording, the parties' use of causal connecting language ("*following*") cannot be construed as importing some novel and bespoke concept of causation which does not entail a 'but for' test.

52.6 The 'but for' test applies to that which the clause covers, namely the proved cases of illness sustained resulting from COVID-19 within a 25 mile radius of the premises.

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[14] See APoC, para 60 **{D/16/1584}**.

The question is: would the business interruption loss have been suffered even if those proved cases had not occurred? The FCA accepted that the answer is: yes, it would.

52.7 As a matter of law as applied to the facts, there is no room to conclude that the cases of illness sustained within a radius of twenty five miles were an indivisible part of COVID-19 everywhere, so as to conclude that the counterfactual for the purpose of the 'but for' test reverses all cases of COVID-19 everywhere.

52.8 Consequently, the Court's approach and conclusion was wrong in law.

53. Each of these points is briefly developed in the paragraphs which follow.

"following" imported a causal connection and, therefore, a 'but for' test

54. The FCA accepted, and the Court held, that "*following*" imported a causal connection, albeit not a proximate cause requirement but a mere "*looser causal connection*" (Judgment, [95], [194] **{C/3/65, 93}**). The Court was right to hold, and the FCA was right to admit, that "*following*" imports a causal connection.

55. "*following*" imported a 'but for' test of causation because:

55.1 In using causal connecting language ("*following*"), the parties did not define or identify any concept of causation or causal connection different from that which would ordinarily apply.

55.2 The 'but for' test is the bare minimum which is applied for the purpose of distinguishing causes from non-causes.

55.3 The parties might have used, but did not use, non-causal connecting language, such as "*connected with* ***notifiable disease***" or "*relating to* ***notifiable disease***".

Dictionary meaning and other usages in the contract

56. That "*following*" imports a causal connection is consistent with one of its prominent dictionary meanings[15] and its other usages in the same contract between the same parties. The following examples are most relevant:

56.1 First, a comparison of the policy's summary of its coverage with the language of the insuring clause demonstrates that "***following***" was used interchangeably with "***resulting from***":

(a) On page 4 of MSA1 and MSA2, the welcome page, the coverage was summarised as follows:

> "*In return for payment of the premium shown in the schedule, **we** agree to insure **you** against:*
>
> *…*
>
> • *loss resulting from interruption or interference with the **business** following **damage**…*" (Underlining added).
>
> [MSA1: **{C/10/504}**; MSA2: **{C/11/602}**]

(b) Synonymously, the main BI insuring clause in MSA1 and MSA2 promised to pay for

> "*any interruption or interference with the **business** resulting from **damage** to property…*". (Underlining added).
>
> [MSA1: **{C/10/560}**; MSA2: **{C/11/642}**]

(c) Thus, the main BI insuring clause used "*resulting from"* where the summary of it used "*following*". The two were plainly intended to be interchangeable.

56.2 Secondly, the "*Claims – basis of Settlement A – Gross profit*" provision used the phrase: "*following the damage*" (MSA1: **{C/10/560}**; MSA2: **{C/11/642}**). The intention must have been that the word "*following*" here reflected the same causation requirement as "*resulting from*" in the main BI insuring clause, because

[15] Shorter Oxford English Dictionary, "*follow*" (verb) **{F/73}**; Roget's Thesaurus which, under the heading "effect" groups together as adjectives: "*resultant, resulting, following, ensuing; consequent…*" – Roget's International Thesaurus (4th Ed) at 154.7 **{F/72}**; Fowler's Dictionary of Modern English Usage (4th Ed 2015), where one of the usages of "*following*" is where "*there is a strong element of consequence*" **{F/67}**.

the basis of settlement provision would only be applicable to situations where the "*resulting from*" requirement in the insuring clause had been met.

57. Two further examples relate specifically to MSA1.

57.1 First, the definition of "*Consequential loss*" in MSA1, which is incorporated into MSA1 Clause 6. Once that definition is verbally manipulated (and the Court has rightly held that it must be – see Judgment, [194] **{C/3/93}**) so as to make it applicable to (amongst other non-damage covers) the disease clause, it is apparent that "*in consequence of*" in the definition of "Consequential loss" is being used interchangeably with "*following*" in the disease clause MSA1 Clause 6.

57.2 Just like "*resulting from*", "*in consequence of*" is a phrase connoting a significant causal connection. Indeed both phrases ordinarily connote proximate cause.[16] The Court was wrong, therefore, to hold as it did in [194] of the Judgment.

57.3 Secondly, MSA1 Clause 1 – Action of competent authorities, which covers loss resulting from interruption of or interference with the business <u>following</u> action by the police or other competent local, civil or military authority <u>following</u> a danger or disturbance in the vicinity of the premises where access will be prevented (see Judgment, [419] **{C/3/150}**). In relation to this clause, and specifically the final phrase "*following a danger or disturbance in the vicinity of the premises…*", the Court held that these words "*… demonstrate that the cover under this clause is a narrow, localised form of cover*" (at [436] **{C/3/155}**), where the Court rejected the FCA's submission that the entire country could be described as the vicinity of the insured premises. In light of this, the Court then held:[17]

> "437. Even if there were a total closure of insured premises pursuant to the Regulations, there could only be cover if the insured could demonstrate that it was the risk of COVID-19 in the vicinity, in that sense of the neighbourhood, of the insured premises, as opposed to in the country as a whole, which led to the action of the government in imposing the

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16 See ***Lloyds TSB General Insurance Holdings v Lloyds Bank Group Insurance Co Ltd*** [2002] Lloyd's Rep IR 113 at [42] *per* Potter LJ **{F/36}**; ***TKC London Limited v Allianz Insurance Plc*** [2020] EWHC 2710 (Comm) at [109] **{F/49}**; Birds, Milnes & Lynch, ***MacGillivray on Insurance Law*** (14th Ed 2018) at 21-004 **{E/51}**.

17 A conclusion against which the FCA is not appealing.

Regulations. It is highly unlikely that that could be demonstrated in any particular case." **{C/3/155}**

"following" imported an effective cause, indeed proximate cause, test

58. As above, "*resulting from*" and "*in consequence of*" import a significant causal connection. That both phrases ordinarily connote proximate cause again emphasises that "*following*" is intended to import an effective cause which, at the very least, imports factual causation and the application of a fundamental 'but for' test.

59. In addition to importing an effective cause, "*following*" actually provides the causal link between the insured peril and the indemnifiable loss.

    59.1 Contrary to [94]-[95] of the Judgment, "*interruption of or interference with the business*" is not the, or part of the, insured peril **{C/3/64-65}**. MSA adopts the submissions of the Second Appellant (Argenta) at paras 22-32 and 42-46, and the Fifth Appellant (QBE) at paras 59-66, on this issue.[18]

    59.2 On this basis, the default position, pursuant to section 55(1) of the Marine Insurance Act 1906, applies, *viz.* "*following*" imports proximate causation **{E/6/94}**.

    59.3 That default position is reinforced, not displaced, by the contract: the wordings use "*following*" interchangeably with clear proximate cause language (see paragraphs 56 to 57 above).

60. In any event, the debate between proximate cause or looser causal connection makes no difference: either way, causal connecting language ("*following*") imports a minimum 'but for' connection between the business interruption loss and the *"**notifiable disease** within a twenty five mile radius*".

[18] To the extent necessary, MSA will make submissions with reference to the main BI insuring clause in MSA1 and MSA2 which both state "***we** will pay **you** for any interruption or interference with the business resulting from damage to property used by you at the premises…*" (MSA1: **{C/10/560}**; MSA2: **{C/11/642}**, underlining added). Both clauses envisage that the "*interruption or interference with the business*" is part of the loss for which the insurer will pay the insured. "*interruption of or interference with the business*" must have the same meaning in the non-damage BI covers as it does in the main BI insuring clause.

The general law imports a 'but for' test as part of any causation enquiry

61. The general law is relevant as being the factual matrix which was known, or reasonably available to be known, to both parties and against the background of which the contract was concluded. If necessary, it also supports MSA's case.

62. The law employs the 'but for' test to distinguish those facts which are (in any factual sense) causal from those facts which are simply not. The law recognises only very narrow exceptions, none of which is alleged by the FCA to apply in the present case.[19]

63. The fundamental starting point of any causation enquiry is whether the loss or event would, as a matter of fact, still have occurred regardless of the candidate for its cause.[20]

64. The 'but for' test is an undemanding but essential threshold enquiry. It simply reflects the common sense that A cannot be said in any way to have caused B, however remotely, if B would still have occurred even if A had not. As a primitive threshold test, the 'but for' test often produces a wide range of factual causes. These provide the range of candidates from which the legally relevant cause(s) is/are (depending on the legal test to be applied) finally selected - ***Reeves v Commissioner of Police of the Metropolis*** [2000] 1 AC 360, 392 B-E, *per* Lord Hobhouse **{E/35}**.

> "Any disputed question of causation (factual or legal) will involve a number of factual events or conditions which satisfy the "but for" test. A process of evaluation and selection has then to take place. It may, for example, be necessary to distinguish between what factually are necessary and sufficient causes. It may be necessary to distinguish between those conditions or

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19 For example, where a pre-contractual misrepresentation is fraudulently made, the victim of the deceit need not prove that but for the fraudulent misrepresentation, the contract would not have been entered into – ***BV Nederlandse Industrie van Eiprodukten v Rembrandt Enterprises Inc.*** [2019] EWCA Civ 596; [2020] QB 551 **{F/12}**. Albeit in different contexts, this court has repeatedly stated that the 'but for' test should be modified in exceptional cases only, and that courts should exercise great restraint before tampering with the test: see ***Fairchild v Glenhaven Funeral Services*** [2003] 1 AC 32 at [43] **{E/17}**; ***Barker v Corus UK Ltd*** [2006] QB 572 at [1], [5], [7] **{F/8}**; ***Sienkiewicz v Greif (UK) Limited*** [2011] 2 AC 229 at [186], [189] **{F/45}**. See also the Court of Appeal in ***Equitas Insurance Ltd v Municipal Mutual Insurance Ltd*** [2020] QB 418 at [90]-[91] **{F/28}**.

20 See Lord Nicholls' explanation of the fundamental two-stage causation inquiry in the law of damages, involving first the threshold test of 'but for' causation, and second legal causation: see ***Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)*** [2002] 2 AC 883 at [68]-[75] **{E/25}**. See also ***Clerk & Lindsell on Torts****, 23rd Edition*, para 2-09 **{F/57}**; ***McGregor on Damages****, 20th Edition*, paras 8-005-8-007 **{F/63}**. In the contractual context, see ***Greenwich Millennium Village Ltd v Essex Services Group Plc*** [2013] 3059 (TCC) at [171]-[172] **{F/32}**; ***The Kamilla*** [2006] 2 Lloyd's Rep 238 at [15] **{E/24}**; ***Carslogie Steamship Co. Ltd v Royal Norwegian Government*** [1952] AC 292 at 301, 305-306 *per* Viscount Jowitt **{F/14}**; ***Orient-Express*** at [21], [33] **{E/31}**.

> events which merely provide the occasion or opportunity for a given consequence and those which in the ordinary use of language would (independently of any imposed legal criterion) be said to have caused the relevant consequence. Thus certain causes will be discarded as insignificant and one cause may be selected as the cause. It is at this stage that legal concepts may enter in, either in a way that is analogous to the factual assessment - as for "proximate" cause in insurance law - or, in a more specifically legal manner, in the attribution of responsibility (bearing in mind that responsibility may not be exclusive). In the law of tort it is the attribution of responsibility to humans that is the relevant legal consideration."

65. Unless, however, the primitive threshold of the 'but for' test is crossed, the candidate for selection as the cause of a consequence is no cause at all. Something cannot be the cause if it made no difference to the consequence, in the sense that the consequence would have occurred regardless.[21]

66. Whilst some commentators have debated whether any causation enquiry involves a two-stage process (involving first factual and secondly legal causation),[22] the authorities clearly establish[23] that whenever a legally relevant cause needs to be selected, the choice may only be made from candidates which have already crossed the factual threshold, namely the 'but for' requirement. A legal cause cannot be something which was not a factual cause.

67. The development of English law principles of causation has been predominantly in the context of determining what loss was caused by a breach of duty (in contract or in tort). That determination is made on the compensatory principle of putting the claimant in the position in which it would have been but for the breach and in no better position: ***Robinson v Harman*** (1848) 1 Exch. 850, at 855 *per* Parke B **{F/41}**; ***Bunge SA v Nidera NV*** [2015] 3 All ER 1082, per Lord Sumption at [14] **{F/11}**; ***C&P Haulage v Middleton*** [1983] 1 WLR 1461, per Ackner LJ at 1467H-1468A **{F/13}**; ***Co-operative Insurance Society Ltd v***

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21 ***Assicurazioni Generali SpA v ARIG*** [2003] Lloyd's Rep IR 131 at [187] *per* Sir Christopher Staughton **{E/9}**: in the context of inducement for misrepresentation or non-disclosure, "*causation cannot in law exist when even the "but for" test is not satisfied.*" Also ***Kuwait Airways v Iraqi Airways Co (Nos 4 and 5)*** at [72] **{E/25}**.

22 An approach which has received judicial support at the highest level – see Lord Nicholls in ***Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)*** at [69]-[70] **{E/25}**.

23 ***Reeves v Commissioner of Police of the Metropolis*** [2000] 1 AC 360, 392 B-E **{E/35}** (quoted at paragraph 64 above) and other authorities cited at footnote 20 above and paragraphs 67 to 69 below.

Argyll Stores (Holdings) Ltd [1998] AC 1, per Lord Hoffmann at 15H **{F/17}**; ***Kramer, The Law of Contract Damages*** (2nd Ed 2017) at 1-35-1-36, 1-38; Ch. 11 **{E/47}**.

The law of insurance also imports a 'but for' test

68. The law of insurance, as a species of the law of contract,[24] is no exception to this fundamental principle: ***Callaghan v Dominion Insurance*** [1997] 2 Lloyd's Rep. 541 , per Sir Peter Webster at 544 **{E/12}**; and ***Endurance Corporate Capital v Sartex Quilts*** [2020] EWCA Civ 308 *per* Leggatt LJ at [35]-[36] **{E/37}**:

> "35… in a case where (as here) an insurer has agreed to "indemnify" the insured against loss or damage caused by an insured peril, the nature of the insurer's promise is that the insured will not suffer the specified loss or damage. The occurrence of such loss or damage is therefore a breach of contract which gives rise to a claim for damages…
>
> 36. The general object of an award of damages for breach of contract is to put the claimant in the same position so far as money can do it <u>as if the breach had not occurred</u>: see e.g. *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, 689…" (underlining added)

69. That the 'but for' test is a fundamental part of the causation enquiry in the insurance context, and a necessary aspect of the proximate cause enquiry, is evident from case law, and from leading insurance textbooks (including those dealing specifically with business interruption). In addition to the foregoing:

69.1 **<u>Cases</u>**: ***Blackburn Rovers Football v Avon Insurance Plc*** [2005] Lloyd's Rep IR 447 at [18] *per* Lord Phillips MR **{E/11}**; ***McCann's Executors v Great Lakes Reinsurance (UK) Plc*** [2010] CSOH 59 at [12] *per* Lord Hodge **{E/43}**; ***Orient-Express Hotels v Assicurazioni Generali*** [2010] Lloyd's Rep IR 531 at [21], [33] **{E/31}**.

69.2 **<u>Textbooks</u>**: Birds, Milnes & Lynch, ***MacGillivray on Insurance Law*** (14th Ed. 2018) at footnotes 1[25] and 27 to Chapter 21 **{E/51}**; Hemsworth (formerly Clarke) (ed.)***, Law of Insurance Contracts*** at paras 25-1, 25-6B **{F/60}**; ***Riley on Business Interruption***

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24 A contract of insurance is a contract of indemnity: section 1 of the Marine Insurance Act 1906 **{E/6/92}**; ***Castellain v Preston*** (1883) 11 QBD 380 at 386 *per* Brett LJ **{F/15}**.

25 "*Cases in which "but for" causation is not required will be truly exceptional, and absent clear indications of contrary intention where the requirement for proximate causation remains a fundamental principle.*"

Insurance (10th Ed 2016) at paras 3.10, 15.9 **{E/50}**; ***Walmsley on Business Interruption Insurance*** (2nd Ed 2016) at page 61 **{F/66}**.

70. The application of a 'but for' test is not displaced by section 55(1) of the Marine Insurance Act 1906, which provides that, unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but is not liable for any loss which is not proximately caused by a peril insured against. Satisfying the 'but for' test is an inherent feature of proximate causation. The insured peril cannot have been the proximate cause if the loss would still have occurred but for the insured peril's operation.

71. For these reasons, MSA submits that "*following*" and the causal connection it required plainly imported a 'but for' test to distinguish causes of the loss from non-causes of the loss.

The parties did not agree a novel or bespoke causation regime

72. In the specific contractual context outlined above and against the factual matrix summarised above, the parties did not define the word "*following*" or provide in any way that the word was to be understood or applied in a manner deviating from the norm. The Court clearly recognised this to be the case in the MSA1 Clause 1 – Action of competent authorities clause which also used the causal connector "*following*": see clause at [419] **{C/3/150}** and analysis at [436]-[437] **{C/3/155}**.[26]

73. In particular, the parties did not provide that the requisite causal connection would be proved upon some notion of causal contribution where the 'but for' test was not satisfied. As to this:

73.1 The Court's Judgment flirts with and/or succumbs to the temptation of such an approach – *e.g.* Judgment, [112] **{C/3/69}**. [27]

73.2 It is temptingly easy to assert that each individual case of COVID-19 made its own individual contribution to the full national picture to which the government action was a response (where the immediate cause of the business interruption loss was

[26] These conclusions are not being appealed.

[27] An approach which the Court itself recognised as being "*less satisfactory*" (at [112] **{C/3/69}**).

the government action and/or public reaction in response to COVID-19 and the threat of COVID-19 generally).

73.3 However, it is common ground that the government action would have been precisely the same even if the reported cases of COVID-19 within the relevant radius of any given insured premises had not occurred.

73.4 This means that, on any normal analysis, those local reported cases of COVID-19 were not in any sense the, or a, cause of the government action and therefore of the business interruption loss, precisely because the loss would still have occurred even if the local reported cases of COVID-19 had not.

73.5 It is impermissible to substitute in place of the normal analysis some novel, unexplained and undeveloped notion of causal contribution which is no such thing.[28] Once it is shown that the local reported cases do not satisfy the 'but for' test when applied to the government action, there is no room to assert that those local reported cases made any causal contribution at all.[29] They may have been part of the factual background in the context of which the government acted, but they were not a cause in any sense of the government's action.

74. The Court itself recognised this in the context of MSA2 Clause 8 Prevention of access – non damage (see clause at [419] **{C/3/150}**) in relation to which it said "*Even if the presence of a person with COVID-19 within the radius or in the vicinity could be said to be "an incident"… it simply cannot be said that any such localised incident of the disease caused the imposition by the government of the restrictions.*"[30]

75. It is no answer to say that, on MSA's approach, the government action was not caused by any of the reported cases of COVID-19 anywhere, because the same action would

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28 This is especially so where the FCA has expressly eschewed reliance on any of the narrow, exceptional and rare exceptions to the 'but for' test, for e.g. in ***Fairchild v Glenhaven Funeral Services Ltd*** [2003] 1 AC 32 **{E/17}**: see transcript of the trial, Day 1/92/1-9 **{D/26/1632}**.

29 Let alone that those local reported cases were a proximate cause of the loss.

30 At [418] **{C/3/149}**. This was said in the context of the identical Hiscox Non-Damage Denial of Access provision (see [439] **{C/3/156}**). This conclusion is not being appealed.

have been taken even if the reported cases local to each (and therefore every) insured premises anywhere and everywhere had not occurred (see Judgment, [112] **{C/3/69}**).

75.1 The question of the cause of the government action does not arise in the abstract.

75.2 As between MSA and each of its insureds separately, the question is whether the proved cases of illness sustained resulting from COVID-19 within a 25 mile radius of the particular insured's premises caused the government action (in at least the 'but for' sense) and therefore caused the interruption of or interference with the insured's business (in at least the 'but for' sense).

75.3 In other words, the question of cause, and whether the business interruption was causally connected to the local proved cases of COVID-19, arises in a limited and individual contractual context. All that matters is the answer to that question in that context; and it is the contract which, by virtue of the wording of the insuring clause, supplies the form of the question to be asked and answered.

Would there have been business interruption but for the proved cases of COVID-19 within a 25 mile radius?

76. The correct formulation of the question is determined by the language of the insuring clause.

77. For the reasons given in relation to ground one (above), the insuring clause promises an indemnity in respect of the business interruption consequences of "***notifiable disease*** *within a radius of twenty five miles…*". Consequently, the word "*following*", and the causal connection it imports, poses the question: would the business interruption consequences have been suffered but for the "***notifiable disease*** *within a radius of twenty five miles…*"?

78. The FCA accepts that the answer to this question is yes. Therefore, the cover does not respond, because the business interruption was not caused (in any recognised or intended or agreed sense) by that against which MSA promised to hold the insured harmless.

79. It is no answer to say, if it is being said, that the proved local cases of the disease somehow form indivisible parts of the national COVID-19 epidemic.[31] In case it matters, the following points are briefly made:

79.1 There is nothing inherently indivisible about the national COVID-19 epidemic.

79.2 If the parties' contract requires distinctions and divisions to be drawn, they must be drawn because the parties have agreed to draw them. It is then irrelevant that in other, non-contractual contexts those distinctions and divisions are unnecessary to be drawn or artificial to draw.

79.3 The relevant focus of the parties' agreement is "***notifiable disease***" – a defined term. The parties' agreed definition is illness sustained by any person resulting from COVID-19.

79.4 Specific proved cases of illness sustained resulting from COVID-19 are in no contractual or other legal sense indivisible from other cases of illness sustained from the same disease outside the area delineated by a 25 mile radius of the insured premises. My case of COVID-19 (including the location and time at which I suffer it) is entirely separate and distinct from your case of COVID-19. The two are not rendered indivisible simply by virtue of being the same disease sustained as part of the same national epidemic. They are (contractually) distinct and independent of each other, and inherently divisible – even though they come from the same source by virtue of being caused by the same virus.

79.5 Consequently, the Court is simply not driven to conclude that the proved cases of illness sustained within a 25 mile radius, which the disease clause contemplates and the consequences of which it insures, are indivisible from the remainder of the epidemic everywhere else.

79.6 The parties specifically agreed that the insurer will only be liable for loss caused by some cases of illness from COVID-19, and therefore not by others. The proved cases

[31] The notion of indivisibility was deployed in paragraph [111] of the Judgment **{C/3/69}** but it is unclear why it was necessary on the footing of the Court's (erroneous) conclusion that the requirement of a proved case or cases of illness sustained was a mere trigger or proviso, not a limitation on the scope of the cover.

of illness sustained within a 25 mile radius of the insured premises either did or did not cause the claimed business interruption loss. Where the business interruption loss would have been suffered regardless of the proved cases of illness sustained within a 25 mile radius of the insured premises, those cases are not in any sense its cause.

79.7 In a different context, for the purposes of a claim in tort, Laws LJ said in ***Rahman v Arearose Ltd*** [2001] QB 351 at [19] that loss qualifies as indivisible only where "*there is simply no rational basis for an objective apportionment of causative responsibility for the injury between the tortfeasors*" **{F/39}**.[32]

79.8 This is *a fortiori* in the context of a contract, where the parties have agreed that, for the purpose of their bargain and between themselves, they will draw dividing lines between cases of illness from COVID-19 within the 25 mile radius of the insured premises, and those outside that radius.

Drawing the threads together

80. The MSA disease clauses do not provide epidemic or pandemic cover. Cover under the MSA disease clauses is confined to business interruption losses caused by (*viz.* "*following*") a person or persons within the relevant area of the insured premises sustaining illness resulting from COVID-19. Where (as here) the individual cases of COVID-19 within the relevant area made no difference to, and therefore did not cause, the Government's action, the business interruption loss was not "*following*" (i.e. factually, let alone proximately, caused by) the cases of "*illness sustained by any person resulting from*" COVID-19 within the 25 mile radius of the insured premises. Consequently, the MSA disease clauses do not respond.

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32 ***Wright v Cambridge Medical Group*** [2013] QB 312 **{F/51}** is another example of a case in which the loss was not indivisible. The concept of so-called indivisible loss is a rarely encountered creature, even in the law of tort (see ***Dingle v Associated Newspapers Ltd*** [1961] 2 QB 162 **{F/23}**). Cases in which loss has been held to be indivisible are rare. A paradigm case is mesothelioma. What makes it an indivisible injury is that it is (probably) caused by a single fibre of asbestos, which causes the transformation of a normal cell into a malignant one (see ***Barker v Corus*** in which Moses J applied ***Dingle v Associated Newspapers Ltd*** on the basis that mesothelioma was an indivisible injury; his decision is summarised by Lord Hoffmann at [26]-[28]). That single fibre of asbestos is a long way removed from the multiple different cases of COVID-19 afflicting different individuals at different times and in different places since February 2020.

THE THIRD GROUND: THE COURT WAS WRONG IN ITS APPROACH TO TRENDS CLAUSES AND COUNTERFACTUALS

81. Two fundamental issues arise on this ground of appeal:

81.1 **First**, whether the correct counterfactual to be applied under the MSA disease clauses in the assessment of an insured's loss is to assume that, once cover under the MSA1 and MSA2 policies is triggered:

(a) There were no proved cases within a 25 mile radius of the insured premises of person(s) who had sustained illness resulting from COVID-19 but COVID-19 remained everywhere else (as MSA argued, see Judgment, [92], [187] **{C/3/63, 92}**), **or**

(b) There was no COVID-19 anywhere in the UK and no public and public authority response thereto (as the FCA argued, and the Court held, see Judgment, [91], [122], [532] **{C/3/63, 71, 179}**).

81.2 **Secondly**, whether the Court was correct in holding that ***Orient-Express Hotels Ltd v Assicurazioni Generali*** [2010] Lloyd's Rep IR 531 **{E/31}** was distinguishable as a matter of principle and/or was wrongly decided.

The relevant basis of settlement provisions

82. As is commonly the case in BI policies, MSA1 and MSA2 contain contractual machinery setting out formulae for how the insured's BI losses are to be adjusted. These clauses are referred to in the policies as "basis of settlement" provisions.

83. The basis of settlement provisions include a "*a most important provision for…adjustment*",[33] referred to in this litigation as the "**trends clause**".[34] Its purpose is

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33 ***Riley on Business Interruption Insurance*** (10th Ed 2016) at para 3.25 **{E/50}**.

34 This clause is also known as the "other circumstances clause", "the special circumstances clause", "the adjustments clause" or "the bracketed provision": see ***Riley on Business Interruption Insurance*** (10th Ed 2016) at paras 3.25-3.26 **{E/50}**.

to give effect to the requirement that the insured be indemnified in respect of loss caused by the insured peril, not more and not less.[35]

84. The basis of settlement clauses in MSA1 are referred to at [181] of the Judgment **{C/3/91}**.

84.1 Basis of settlement A for "Gross profit" in MSA1 provides, *inter alia*, that the amount payable will be "*for reduction in **turnover**, the sum produced by applying the rate of gross profit to the amount by which the **turnover** during the indemnity period will following the **damage** fall short of the **standard turnover**…*" **{C/10/560}**.

84.2 The definition of "**standard turnover**" contains a trends clause in the following terms **{C/10/559}**:

> "*The **turnover** during that period in the 12 months immediately before the date of the **damage** which corresponds with the **indemnity period** to which adjustments will be made as necessary to provide for the trend of the **business** and for variations in or other circumstances affecting the **business** had the **damage** not occurred, so that the figures adjusted represent as nearly as may be reasonably practicable the results which but for the **damage** would have been obtained during the relative period after the **damage**.*" (Underlining added).

85. The MSA2 policies contain similar provisions **{C/11/642, 641}**.

86. The trends clauses in MSA1 and MSA2 (like others in this test case) are drafted very widely to encompass adjustments for anything that affected or would have affected the business had the insured peril not occurred. No restrictions are placed on the type or nature of "trends", "variations" or "other circumstances" that can be taken into account.[36]

Important matters which are common ground

87. A number of important matters are now common ground for this third ground of appeal.

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[35] See ***Orient-Express*** at [45] **{E/31}**; ***Riley on Business Interruption Insurance*** (10th Ed 2016) at paras 3.25-3.26 **{E/50}**.

[36] There is no basis for the FCA's assertions, should they be repeated, that the trends clauses only permit adjustment for "*something extraneous*" or "*independent*" to the event or state of affairs giving rise to the insured peril. Or that the trends clauses are only intended to adjust for the "*ordinary vicissitudes of commercial life*" – whatever that means.

88. **First, the trends clauses in MSA1 and MSA2 apply to the MSA disease clauses** (and other non-damage covers): Judgment, [198] **{C/3/94}**. For the basis of settlement provisions, including the trends clauses, to apply to non-damage covers, the defined term "**damage**"[37] has to be verbally manipulated to read "insured peril" or "**damage** or insured peril": Judgment, [120], [387] **{C/3/71, 142}**. The FCA does not appeal the Court's decision on this issue.

89. **Secondly, the insured's losses are to be assessed so as to put it in the same position it would have been in 'but for' the insured peril**.

89.1 In other words, the Court accepted that the 'but for' approach was the correct approach to the counterfactual: see Judgment, [121] **{C/3/71}**.

89.2 The Court reached this conclusion on the basis of the contractual quantification provisions, which expressly provide for the application of the 'but for' test in the trends clauses (see para 84.2 above).[38] The FCA does not challenge this conclusion.

89.3 This conclusion would, in MSA's submission, have applied in any event quite apart from the contractual language. The applicable basis of settlement clauses merely give contractual force to the ordinary principles of causation (and indemnity) which would otherwise be applicable as a matter of law.[39]

90. **Thirdly, on this basis, the correct counterfactual requires only the insured peril to be stripped out** (Judgment, [121]-[122], [532] **{C/3/71, 179}**). Everything else is to remain.

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37 "**Damage**" in MSA1 is defined as "*Loss or destruction of or damage to the property insured as stated in the schedule and used by **you** in connection with the **business**.*" **{C/10/512}**

38 Judgment, [121]: "*the object of the quantification machinery (including any trends clause or provision) in the policy wording is to put the insured in the same position as it would have been in if the insured peril had not occurred*" **{C/3/71}**.

39 Specifically, an insurer is not obliged to hold the insured harmless against losses which it would have suffered in any event if the insured peril had not occurred: see ***Endurance Corporate Capital v Sartex Quilts*** [2020] EWCA Civ 308 at [35]-[36] **{E/37}**. See also ***Callaghan v Dominion Insurance*** [1997] 2 Lloyd's Rep 541 at 544 **{E/12}**; ***Orient-Express***, award at [17], [20] (quoted at [17] of Hamblen J) and Hamblen J at [21], [33] **{E/31}**. See also ***Riley on Business Interruption Insurance*** (10th Ed 2016) at paras 3.10, 15.9 **{E/50]}**.

The first issue: the correct counterfactual

91. The Court erred in law in concluding that:

91.1 The correct counterfactual when calculating an indemnity is to strip out "*the business interruption referable to COVID-19 including via the authorities' and/or the public's response thereto*" (Judgment, [122] **{C/3/71}**; see also [532] **{C/3/179}** and para 11.2(a) of the Court's 2 October 2020 declarations Order **{C/1/7}**); and

91.2 The insured's indemnifiable losses do not fall to be reduced to the extent necessary to remove from the amount of any indemnity the losses the insured would still have suffered but for the insured peril under the MSA disease clauses as a result of any matters outside the scope of the insured peril, including COVID-19 outside the specified 25 mile radius and/or any consequences of the national action/reaction to COVID-19 (including that of the authorities and/or the public) – see para 11.1 in the Court's 2 October 2020 declarations Order **{C/1/6}**.

92. The Court's error of law in relation to the correct counterfactual stems from its mischaracterisation and mistaken construction of the insuring clause – addressed in the first and second grounds of appeal above.

93. As explained above, cover is only provided in respect of the BI consequences at an insured premises caused by a person or persons sustaining illness resulting from COVID-19 within the 25 mile radius of the insured premises. The MSA disease clauses do not provide an indemnity against all the business interruption consequences of COVID-19 anywhere and everywhere in the UK (both within and outside the specified 25 mile radius), provided merely that the insured could prove one instance of COVID-19 within the relevant area.

94. It follows – on the (accepted) basis that the counterfactual reverses the insured peril[40] – that only those proved instances of illness resulting from COVID-19 within the twenty five mile radius of the insured premises are to be reversed in the counterfactual. Contrary to what the Court held at [122], [532] **{C/3/71, 179}**, nothing else is to be

[40] See Judgment, [121]-[122] **{C/3/71-72}**.

reversed; all other instances of COVID-19 and their effects, including the government action in response to the pandemic, are to remain.

95. This puts the insured in the position in which it would have been but for the insured peril.

96. The fact that the proved cases of COVID-19 to be reversed in the counterfactual form part of a broader state of affairs, namely the COVID-19 pandemic, is irrelevant to the correct scope of the counterfactual:

96.1 The counterfactual reverses the insured peril, not more and not less.[41] This indemnifies the insured for the loss caused by the insured peril, not more and not less.

96.2 Reversing more or less than the insured peril inevitably leads to the wrong result. Its effect is to create a different promise: a wider promise of indemnity if more than the insured peril is reversed, and a narrower promise of indemnity if less than the insured peril is reversed.

96.3 It is, therefore, impermissible to reverse everything associated with the national COVID-19 epidemic, in so far as that goes beyond the scope and subject matter of the insuring clause. Instead of confining the counterfactual to what is required by the policy wording, such an approach ignores it.

96.4 By defining and delimiting the insured peril in the way that they do, the MSA disease clauses draw a line between the individual cases of COVID-19 within the 25 mile radius of the insured premises (which are insured), and disease anywhere else (which is not insured). There is nothing artificial about maintaining that line in the application of the 'but for' test.

96.5 Contrary to what the Court has said (Judgment, [348], [388] **{C/3/132, 142}**) about the "*inextricable connection*" between various elements of the COVID-19 pandemic, there is nothing indistinguishable between cases of COVID-19 within the 25 mile radius and the wider outbreak of disease: see ground 2 above.

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41 See ***Orient-Express*** at [46]-[48], [57] **{E/31}**, discussed further below.

97. Further, a counterfactual which reverses certain elements of the COVID-19 pandemic, but leaves others in place would not be unrealistic, artificial or lead to difficulties of proof (contrary to the Court's comments at [279], [280]-[282], [348], [388], [476] **{C/3/115, 132, 142, 164}**, made in the context of its consideration of the hybrid and prevention of access wordings).[42]

97.1 There is nothing absurd, unreasonable, unrealistic or artificial about a counterfactual which reverses only the insured peril and nothing else. That is what the indemnity principle and the trends clauses require. To do otherwise would not be to enforce the parties' bargain but, rather, would be to rewrite it.

97.2 There is nothing in the MSA1 and MSA2 policies that dictates that the counterfactual must be realistic or must not be artificial; nor is there any rule of law or fact that does so. This is unsurprising where a counterfactual is, by definition and by its very nature, concerned with the hypothetical as opposed to the actual. Moreover, there is nothing more artificial or unrealistic than imagining the UK without COVID-19 – yet, this is what the Court has done in its counterfactual: see [122], [532] **{C/3/71, 179}**.

97.3 In any event, a counterfactual which reverses only those proved cases of COVID-19 within the 25 mile radius of the insured premises and nothing else is neither unrealistic nor artificial. It is the very counterfactual applied by the Court in the context of the QBE 2 and 3 wordings.[43] There is no difficulty in imagining a world without cases of illness in a contractually defined area, even though there were cases of illness outside that area: see the example of the Scilly Isles in Agreed Facts Document 10 **{D/14/1548}**. Such a world can be imagined and, by virtue of the parties' definition of the insured peril, must be imagined.

97.4 Any practicality concerns of separating losses caused by cases of COVID-19 within the 25 mile radius, which are insured, and losses caused by other aspects of the COVID-19 pandemic, which are uninsured, are irrelevant.

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42 Similar arguments were made by the insured in ***Orient-Express*** and rejected by Hamblen J at [46]-[48], [51]-[53] **{E/31}**.

43 See para 12.2 in the Court's 2 October 2020 declarations Order **{C/1/8}**.

(a) **First**, if the correct approach in principle gives rise to difficulties of calculation, those difficulties must, simply, be confronted.[44]

(b) **Secondly**, causation and quantification are difficult issues in many areas of the law (including in the adjustment of BI losses) – yet the courts, and often contracting parties, are generally willing and able to do the best they can, assisted by acknowledged methods of assessment and investigation, for which loss adjusters are well equipped. The example that was used by the parties during the course of the trial was of a celebrity chef in a Michelin starred restaurant who hands in his notice the day before a fire. In assessing the insured's BI loss caused by the fire, the insured would have to strip out of the indemnity the extent of the turnover that would in any event have been lost due to the loss of the celebrity chef. That would clearly be a difficult process but it is one that even the FCA accepts has to be undertaken in order to indemnify the insured for loss caused by the insured peril, no more and no less. Notably, the trends clauses do not require certainty or precision: the figures as adjusted should "*represent as nearly as may be reasonably practicable*" the results which would have been achieved *"but for*" the insured peril (MSA1: **{C/10/559}**; MSA2: **{C/11/641}**).

(c) **Thirdly**, in many cases – the archetypal cases to which the MSA disease clauses were intended to apply – there will be no difficulty in operating the causation counterfactual.[45] The fact that difficulties may arise in the present case given the wide area impact of COVID-19 does not justify altering the counterfactual or expanding the scope of the insured peril.[46]

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[44] See the tribunal's observations in ***Orient-Express*** at [20] of the award, cited by Hamblen J at [17]: "*As for the point that this is an artificial enquiry, all claims for Business Interruption raise hypothetical issues and whilst the tribunal would acknowledge that the evaluation required on the facts of the present dispute is more difficult than most, this cannot affect what is the correct approach in principle.*" **{E/31}**

[45] Take, for example, a localised measles outbreak in a school district falling within the 25 mile radius, and its impact on nearby businesses.

[46] The fact that quantification issues may be difficult where events have wide area impact does not make them impossible as demonstrated by the exercise conducted by the tribunal in ***Orient-Express*** without any inquiry into actual motives: see Hamblen J at [18], [53] **{E/31}**.

The second issue: the Court's conclusions on Orient-Express

98. ***Orient-Express*** is directly relevant to MSA's third ground of appeal. In particular:

98.1 It underlines the correctness of a 'but for' approach to the counterfactual; and

98.2 It supports Insurers' approach of:

(a) Reversing the insured peril, and only the insured peril, in the counterfactual applicable under the trends clauses; and

(b) Not reversing the cause underlying the insured peril and/or any other effects of that underlying cause.

99. Far from having "*several problems*" (Judgment, [523] **{C/3/176}**), Hamblen J's reasoning in ***Orient-Express*** was unquestionably correct and reflected an entirely orthodox application of causation principles.[47] The Court was wrong to conclude that ***Orient-Express*** was distinguishable and/or that it was wrongly decided – see [523]-[529] of the Judgment **{C/3/176-178}**.

100. ***Orient-Express*** was concerned with the extent of BI losses recoverable by a New Orleans hotel damaged by Hurricanes Katrina and Rita.[48] The hurricanes not only damaged the hotel but also damaged the whole of the surrounding area of New Orleans. The essential dispute was whether the main BI insuring clause should respond to the extent that, because of the wide area damage to New Orleans, the owner of the hotel, Orient-Express Hotels ("**OEH**"), would have suffered the same BI losses even if the hotel had remained undamaged.[49]

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47 ***Orient-Express*** is a decision which had hitherto not been overruled or ever not followed (or even judicially doubted). Although subject to academic criticism, it has been the leading authority in relation to the principles of causation applicable in the assessment of BI loss, and the operation of "trends clauses", and is referred to in every major insurance law textbook. Indeed in ***The Kos*** [2012] 2 AC 164 at [74] **{E/15}**, Lord Clarke cited Hamblen J's judgment in ***Orient-Express*** with approval, even if only *en passant* (see also ***Cultural Foundation v Beazley Furlonge Ltd*** [2019] Lloyd's Rep IR 12 at [173] *per* Andrew Henshaw QC **{F/20}**).

48 See Hamblen J at [3]-[5] for a summary of the facts **{E/31}**.

49 Since few people would have visited the hotel given the devastation of the surrounding area.

101. The insurance was in effect an all risks policy in two parts: a material damage cover, and a BI cover.[50]

101.1 Under the material damage cover, the insurer agreed to indemnify the insured "*against direct physical loss destruction or damage except as excluded herein to Property as defined herein such loss destruction or damage being hereafter termed Damage*".

101.2 Under the BI cover, the insurer agreed to indemnify the insured "*against loss due to interruption or interference with the Business directly arising from Damage*".

102. Hamblen J (as he then was) upheld the award of an arbitral tribunal (Sir Gordon Langley, George Leggatt QC (as he then was), and John O'Neill FCII). He concluded that the tribunal had not erred in law in adopting the 'but for' approach to causation, and that the correct counterfactual to be applied as a matter of law and under the trends clause (which is materially similar to the trends clauses in MSA1 and 2) involved stripping out only the insured peril under the BI cover: *viz.*, the physical damage to the hotel that had been caused by the hurricanes. It did not involve stripping out the hurricanes that had caused the physical damage to the hotel or any other damage to the city of New Orleans that had resulted from the same cause (*viz.*, the hurricanes).

103. Two issues of law were raised on the appeal: see Hamblen J at [2] **{E/31}**.

104. <u>The first issue of law.</u> The crucial issue dividing the parties was the appropriateness of applying the 'but for' causation test to assess the insured's loss (see Hamblen J at [20]). OEH argued that, while "*the normal rule for determining causation in fact is the "but for" test*", that case was "*one of those "very occasional" cases where "fairness and reasonableness" require a relaxation in the standard*" (Hamblen J at [21], [24]). Unlike OEH, the FCA did not and does not seek to rely on any exceptions to the 'but for' test.

105. Hamblen J's conclusions on the first question of law are at [33]-[39]. At [33], Hamblen J restated the conventional principle of causation that as a general rule the 'but for' test

[50] The relevant policy provisions are set out at [12]-[15] of Hamblen J's judgment **{E/31}**.

"*is a necessary condition for establishing causation in fact*".[51] While acknowledging the force in OEH's argument that there may be cases, including in contract, where fairness and reasonableness would require a disapplication of the 'but for' test (particularly where there are multiple wrongdoers involved)[52], he reached a clear conclusion that the case before him was not such a case (see [41], [59] **{E/31}**). For present purposes, two points made by Hamblen J are important:

105.1 First, he held that it had been contractually agreed – in the trends clause – that the 'but for' approach to causation should be adopted in the assessment of recoverable loss. It was thus "*difficult to see how it could ever be appropriate to disregard that causal test, or how the policy would work if one did*" (see Hamblen J at [34]). This very much reflects what the Court itself has held: see Judgment, [121]-[122] **{C/3/71-72}** and para 89 above. Although not expressly acknowledged, it does not appear that the Court disagreed with Hamblen J's conclusion on the first issue. Certainly, none of the criticisms made by the Court at [523]-[529] **{C/3/176-178}** concerns this issue.

105.2 Secondly, Hamblen J held at [38] that there was nothing unfair in applying the 'but for' causation test to the insured peril. The alternative counterfactual – favoured by the Court in this litigation (see Judgment, [527]) – in which both the damage to the hotel and the damage to the City of New Orleans caused by the hurricanes is reversed, would compensate the insured for all BI losses caused by the hurricanes themselves, even where those losses were not in any way caused by Damage to the hotel (and as such are not recoverable under the main insuring clause of the policy). In other words, the unfairness lay in the insured's proposed outcome in that case (and in the outcome favoured by the Court). We return to this point below.

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51 The tribunal and Hamblen J held that the 'but for' test was inherent in the insuring clauses and in the insurer's basic engagements. The trends clause made explicit what was unmistakably implicit anyway: see award, [17], [20] (quoted by Hamblen J at [17]); Hamblen J at [58] **{E/31}**.

52 Self-evidently this is not a case of multiple wrongdoers. In a case where peril A is insured by insurer X, and peril B is insured by insurer Y, and both perils operate concurrently and independently to cause the loss (in that each is sufficient on its own to bring about the loss but neither would pass the 'but for' test because of the other), it may be theoretically possible to draw an analogy with the situation of multiple wrongdoers so as to avoid a potentially unjust / absurd result where neither insurer is liable. That is not, however, this case.

106. The second issue of law: "*whether on the true construction of the policy, the same event(s) which cause the damage to the insured property which gives rise to the business interruption loss are also capable of being or giving rise to "special circumstances" for the purposes of allowing an adjustment of the same business interruption loss within the scope of the "Trends clause""* (see [2] **{E/31}**).

107. Hamblen J answered this question in the affirmative (see [61]). For present purposes, the following points he made are of importance:

107.1 First, the insured peril under main BI insuring clause was Damage (as defined) to the hotel, and not the cause of that damage (i.e. the hurricanes) or other damage which resulted from the same cause: see [52], [56]-[57], [58].[53]

107.2 Secondly, the only assumption to be made in the counterfactual under the trends clause is that the insured peril, i.e. the Damage to the hotel, had not occurred; the entire hurricane was not to be reversed: see [46]-[48], [57].

107.3 Thirdly, Hamblen J rejected OEH's argument that to reverse only the damage to the hotel, but leave in the counterfactual the remaining effects of the hurricanes would have "*the remarkable result that the more widespread the impact of a natural peril, the less cover is afforded by the business interruption policy for the consequences of damage to the insured property*" (at [51]). He said:

> "[U]*nder this policy the amount recoverable under the main insuring clause will always depend on the extent to which the business interruption losses claimed are caused by damage. That is what the main insuring clause requires as a matter of causation. It has nothing to do with whatever other devastation the hurricanes may have caused elsewhere than at the insured property*" (at [51]).

107.4 Fourthly, echoing what he had said at [38], Hamblen J held that OEH's construction, which would allow it "*to recover for the loss in gross operating profit suffered as a*

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53 See also [20] of the tribunal's award (quoted at [17] by Hamblen J): "[The language in the BI insuring provisions] *requires OEH to establish that the cause of the loss claimed is the Damage to the Hotel. It is not necessary or relevant for this purpose to go behind the Damage and consider whether the event which caused the Damage also caused damage to other property in the City: the fact that there was other damage which resulted from the same cause does not bring the consequences of such damage within the scope of the cover.*" **{E/31}**

result of the occurrence of the insured event (ie the hurricanes) as opposed to the loss suffered as a result of the damage to the hotel" was:

> "*inconsistent with the causation requirement of the main insuring clause which OEH accepts requires proof that the losses claimed were caused by damage to the hotel*" (at [58] **{E/31}**).

108. The Court's criticisms. The Court made a number of criticisms at [523]-[529] of this part of Hamblen J's judgment **{C/3/176-178}**. None has merit. Each is addressed in the paragraphs that follow.

109. **First**, there is nothing in the criticism that Hamblen J "*focused only on the "but for" causation issue*" and "*surprisingly, did not pose the question of what was the proximate cause of the loss claimed*" (see [523] **{C/3/176}**). Hamblen J plainly had in mind the proximate cause test – it is expressly referred to at [29] of his judgment. What *is* surprising is the suggestion that Hamblen J, and inferentially the tribunal, failed to ask the right causation question. They clearly did.

110. Hamblen J's focus was correctly on the logically anterior question of 'but for' causation given:

110.1 The main battleground between the parties on the first issue of law was in relation to 'but for' causation: Hamblen J at [20] **{E/31}**;

110.2 The 'but for' approach was the agreed approach to causation for the purposes of the counterfactual in the trends clause: Hamblen J at [34];

110.3 Save in exceptional circumstances, the 'but for' test is a necessary but not sufficient threshold condition for establishing causation: Hamblen J at [21], [33]; and

110.4 Where losses do not pass the 'but for' test, they have not, in fact, been caused by the insured peril, and further consideration of proximate causation is unnecessary: see ground 2 above.

111. Therefore, even if Hamblen J had put the question in terms of whether the insured peril (i.e. Damage) had proximately caused OEH's losses, he would have applied the same counterfactual which was in fact applied, and reached the same conclusion which in fact he reached.

112. **Secondly,** Hamblen J was entirely right that the insured peril under the BI part of the policy was Damage to the hotel, and not the cause of that damage, i.e. the hurricanes (*cf.* [523]-[527] **{C/3/176-177}**). There was no misidentification of the peril.

112.1 The insured perils under the two sections of cover in the policy were not the same – that is to be expected as they cover different risks.

112.2 The relevant insured peril under the material damage section was the hurricanes: the fortuitous, non-excluded cause of the physical damage to the hotel.

112.3 The relevant insured peril under the BI section was the damage to the hotel resulting from a fortuitous non-excluded cause: Damage.

112.4 The non-excluded fortuitous cause of the damage to the hotel (the hurricanes), was not irrelevant. It identified and defined what physical damage to the hotel constituted Damage under the BI section.

112.5 But the non-excluded fortuitous cause was not itself the peril under the BI section of the policy. As Hamblen J held, the insured peril under the BI section was the Damage and not the cause of the damage.

112.6 Contrary to what is said at [523], [525] of the Judgment, Hamblen J did not hold that the BI section of the policy in ***Orient-Express*** insured against "*Damage in the abstract*". That ignores the fact that inherent within the definition of Damage was an identification of what physical damage was insured, i.e. only physical damage caused by a fortuitous, non-excluded cause.

112.7 What Hamblen J did hold, in MSA's submission, correctly, was that it was only that Damage which was insured under the BI section of the policy, and not the fortuitous non-excluded cause itself, or indeed some other (uninsured) damage caused by that same cause: Hamblen J at [52], [56]-[57], [58] **{E/31}**.

113. **Thirdly**, and following on from the second point, the Court was wrong that the hurricanes were "*an integral part of the insured peril*" ([523], [527] **{C/3/176, 177}**) such that they were to be stripped out in their entirety (including all their effects) in the counterfactual. So construed, the insurers in ***Orient-Express*** would have been providing insurance

against *all* BI consequences of the fortuitous, non-excluded cause, i.e. the hurricanes, so long as there was some property damage to the hotel (no matter how insignificant). That would have been inconsistent with the parties' bargain and would have vastly expanded the scope of cover that insurers agreed to undertake. This was the very point Hamblen J rightly made at [38], [58] of his judgment **{E/31}**.[54]

114. The correct counterfactual (as held by the tribunal and Hamblen J) assumes that there is no physical damage to the hotel caused by the hurricanes (i.e. Damage), but that the hurricanes themselves and all their other effects remain.

115. **Fourthly**, contrary to the suggestion at [525] of the Judgment **{C/3/177}**, it would have made no difference to Hamblen J's analysis or conclusions if the policy was a specified perils rather than an all risks policy. There is no difference in substance between the two.[55] If the material damage part of the policy in ***Orient-Express*** had specifically identified hurricane as an insured fortuity, the insured peril in the BI section would still have been Damage, as Hamblen J held, where Damage was defined as direct physical loss destruction or damage caused by a specified fortuity. The counterfactual applied by the tribunal, and upheld by Hamblen J, would again have been the same: the only matter to be reversed would have been the Damage, but not the hurricanes for all intents and purposes.

116. **Fifthly**, the Court was wrong that Hamblen J's analysis in ***Orient-Express*** had the "*remarkable*" result that "*the more serious the fortuity, the less cover the policy provides for the consequences of damage to the insured property*" (see [526]).

116.1 It is wrong to assume that the greater the seriousness of the fortuity, the less cover provided under the counterfactual applied by Hamblen J. This is entirely fact sensitive. If the hotel had been undamaged, one might possibly expect all

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54 Should the FCA seek to revive its reliance on ***The Silver Cloud*** [2004] Lloyd's Rep IR 217; [2004] Lloyd's Rep IR 696 **{E/18, 19}** in apparent support of the proposition that the counterfactual must reverse not only the insured peril, but the underlying cause of that insured peril, this would be hopeless. It is now an argument that has been twice rejected by the courts: first by Hamblen J in ***Orient-Express*** at [30]-[32] **{E/31}**, and secondly by the Court at [534] of the Judgment **{C/3/179}**. That case turns on its own factual conclusions and does not lay down any general principles in relation to causation.

55 "'*All risks' has the same effect as if all insurable risks were separately enumerated*": Lord Sumner in ***British and Foreign Marine Ins. Co. Ltd. v. Gaunt*** [1921] 2 AC 41, 57 **{F/9}**.

emergency personnel to have resided there, at premium rates in the absence of alternative accommodation, even in low season months. The loss of revenue in the counterfactual could exceed the hotel's normal revenue, depending on the character of the hotel.[56]

116.2 Moreover, this criticism assumes that the main BI insuring clause was intended to provide cover for *all* the BI effects of so-called wide area damage, and ignores the cover that was provided for wide area events in the prevention of access and loss of attraction extensions to cover (see Hamblen J at [14]-[16] **{E/31}**). If the main BI insuring clause had been designed to provide such cover, it could have insured OEH against BI caused by all risks. It did not do so. Not having done so, it is wrong to criticise the judgment for failing to construe the policy so as to provide the insured with cover that it did not obtain and, one imagines, did not pay for.

116.3 In fact, what *is* remarkable is the counterfactual that the Court said ought to have been applied: see [527] **{C/3/177}**. A hotel in New Orleans in an advantageous sheltered position and which only suffered minimal damage as a result of Hurricane Katrina – say, a single broken window – would, on the Court's analysis, be able to recover for *all* BI loss caused by the hurricane. That cannot be right.

117. **Finally**, as for the academic criticism referred to at [528] of the Judgment **{C/3/178}**, the Court ought to have concluded that such criticism is of no persuasive force. The view that Hamblen J's approach leads to the curious outcome that the greater widespread impact of an insured event, the lesser the cover, is wrong for the reasons set out above. Moreover, these criticisms proceed on the implicit assumption that there ought to have been cover as argued by the insured. If that is to be the correct premise, there is no point in having the argument.

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[56] The Court went so far as to assume that where there is wide area damage, the insured's recovery would be nil and the BI cover would be rendered illusory. This is, however, mere supposition and is contradicted by the facts of the ***Orient-Express*** itself **{E/31}**. Although, the full award is not appended to Hamblen J's decision, it is apparent from the sections of the award quoted at [17], and what is said at [18] and [53], that the tribunal's detailed assessment of the insured's recoverable losses *did* lead to recovery by OEH under the main BI insuring clauses of the policy (albeit at a level below that which it had claimed). In addition, as noted by Hamblen J at [16], OEH also recovered, up to sublimits, under the prevention of access and loss of attraction extensions to cover.

118. Notably, a number of other leading insurance textbooks regard the decision as according with orthodox principles of causation: see ***MacGillivray on Insurance Law*** (14th Ed 2018) at paras 21-001, 21-005 **{E/51}**; and ***Arnould: Law of Marine Insurance and Average*** (19th Ed 2018) at para 22-05 **{F/55}**. These are not referred to in the Judgment.

119. ***Orient-Express*** was, therefore, correctly decided.

120. It also cannot be distinguished (contrary to [529] of the Judgment **{C/3/178}**). Other than superficial, immaterial differences, ***Orient-Express*** is plainly relevant to the proper approach to the counterfactual under the virtually identical trends clauses in the MSA1 and MSA2 policies: *a fortiori* in circumstances where the COVID-19 pandemic not only caused cases of COVID-19 within a specified radius of the insured premises (the BI consequences of which are insured under the BI section of the policy), but also caused cases of COVID-19 everywhere else (the BI consequences of which are uninsured).

121. Applying Hamblen J's analysis to this case:

121.1 Only the insured peril, i.e. proved cases of COVID-19 within the 25 mile radius, is to be reversed in the counterfactual.

121.2 The relevant peril is not the cause of those proved cases within that radial limitation. It is not the pandemic or the widespread disease elsewhere.

121.3 The relevant peril is not the government response to the entire COVID-19 pandemic.

121.4 Even if the individual cases of disease within the 25 mile radius were an integral part of the COVID-19 pandemic, the COVID-19 pandemic was not an integral part of those individual cases of disease.

121.5 Therefore, the entire COVID-19 pandemic (together with the blanket governmental responses to it) is not to be stripped out in the counterfactual so as to allow insureds to recover for *all* BI losses caused by the COVID-19 pandemic so long as there was one case of COVID-19 within the 25 mile radius (no matter how causatively insignificant).

121.6 That is inconsistent with the parties' bargain and vastly expands the scope of cover that MSA agreed to undertake. It is to transform cover into disease everywhere in the UK provided that one case of illness from the disease can be proved to have been sustained within the 25 mile radius.

One final point: pre-trigger losses

122. The Court rightly held that the continuation of a measurable downturn in the turnover of a business due to COVID-19 before the insured peril was triggered could in principle be taken into account in the counterfactual as a trend or circumstance (under a trends clause or similar) in calculating the indemnity payable in respect of the period during which the insured peril was triggered and remained operative: see Judgment, [345]-[351], [385]-[389] **{C/3/131-133, 141-142}**, and para 11.4 of the 2 October 2020 declarations Order **{C/1/7}**.[57]

123. While MSA does not, in general terms, dissent from what is said in declaration 11.4, a corollary of what is said above as to the proper approach to the counterfactual is that the continuation of the measurable downturn should not be capped at the pre-trigger level, as declaration 11.4(d) says. The impact of COVID-19 on the insured's business (quite apart from the proved cases of COVID-19 within the 25 mile radius of the insured premises) would be a trend, variation, circumstance etc. both before and after the triggering of the insured peril and could lead to a further downward adjustment of the previous year's income figures even after the triggering of the insured peril.

124. Insurers will address this issue in further detail in their Respondents' written case.

CONCLUSION

125. MSA respectfully submits that its appeal should be allowed and that this Court should vary the declarations made by the Court below accordingly, for the following among other

[57] Although these passages appear in the context of an analysis of other wordings, the Court confirmed at the consequentials hearing on 2 October 2020 that they are of general application. This is reflected in paragraph 11.4 of the 2 October 2020 declarations Order **{C/1/7}**.

REASONS

125.1 BECAUSE (**ground 1**) the MSA disease clauses only provide cover in respect of an insured's premises for the business interruption consequences of a person or persons within a 25 mile radius of those premises sustaining illness resulting from COVID-19.

125.2 BECAUSE (**ground 2**) the word "*following*" imported a requirement of 'but for' causation, such that the MSA disease clauses do not provide cover where (as the FCA accepted) the business interruption loss would have been suffered in any event, even if the proved cases of persons sustaining illness resulting from COVID-19 within a 25 mile radius of any given premises had not occurred or were assumed not to have occurred.

125.3 BECAUSE (**ground 3**) the correct counterfactual to be applied when calculating an indemnity under the MSA disease clauses, whether on an application of the "trends clauses" in MSA 1 and MSA2 or otherwise, requires that only the proved cases of illness resulting from COVID-19 within the twenty five mile radius of the insured premises are to be reversed but not COVID-19 (or its consequences) anywhere else.

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3 November 2020[58]

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[58] Updated on 9 November 2020 to insert references.