

BUSINESS INTERRUPTION INSURANCE TEST CASE

DRAFT TRANSCRIPT

OF CONSEQUENTIALS HEARING ON 2 OCTOBER 2020

What follows is a **draft** transcript.

A final transcript will be published when it is available.

OPUS2

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

Day 1

October 2, 2020

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1 Friday, 2 October 2020
 2 (10.30 am)
 3 LORD JUSTICE FLAUX: Right, we are one minute to half-past
 4 so unless anybody has a concern I'll ask my clerk to
 5 call the case on.
 6 THE CLERK OF THE COURT: Good morning. Before we begin
 7 could I remind everyone that this is a court hearing
 8 and, as such, it could be classed as a criminal offence
 9 for anyone to record the proceedings.
 10 In the matter of the Financial Conduct Authority v
 11 Arch Insurance (UK) Limited and others.
 12 LORD JUSTICE FLAUX: Thank you.
 13 Yes, Mr Edelman?
 14 Housekeeping
 15 MR EDELMAN: My Lord, can I start by firstly thanking the
 16 court for the expeditious way in which the judgment was
 17 produced and also for arranging this hearing at such
 18 short notice and at an earlier date than previously
 19 suggested. It is much appreciated by the FCA and
 20 I'm sure all the parties would express the same
 21 appreciation.
 22 My Lord, the agenda for today is ... someone else has
 23 got a microphone on and there's feedback.
 24 LORD JUSTICE FLAUX: It's probably me, Mr Edelman. (Pause)
 25 MR EDELMAN: The first item on the agenda will be the draft

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1 order, including the declarations. My Lords will
 2 hopefully have received this morning, I think, a further
 3 updated draft. Apologies for the flurry of drafts, but
 4 the parties have been narrowing the issues. So
 5 ordinarily a late flurry of documents might indicate
 6 an escalation of issues but in this case it's the
 7 opposite, and so the latest draft is reflecting some
 8 further areas of agreement between Zurich and the FCA,
 9 and Amlin and the FCA.
 10 There are, on my count, 10 topics to be covered on
 11 the declarations, some more significant than others. We
 12 will then move on to the applications for leapfrog
 13 appeal certificates. Can I say in advance that the
 14 FCA's position is, in the spirit of the framework
 15 agreement, that it does not seek to stand in the way of
 16 any party -- existing party that wishes to appeal any
 17 aspect of the judgment, and so will not be making any
 18 observations on any of the applications made by
 19 insurers.
 20 And then, finally, there will be the QIC Europe
 21 application for joinder, which will be the final item on
 22 the agenda.
 23 So unless there's anything my Lord wants me to
 24 assist with at the moment, I won't introduce the
 25 parties. The list is too long --

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1 LORD JUSTICE FLAUX: No.
 2 MR EDELMAN: -- and I'm sure my Lord has a list.
 3 LORD JUSTICE FLAUX: Can I just say two things on behalf of
 4 the court, Mr Edelman, which may or may not shorten
 5 matters.
 6 On the issue of certificates under, I think,
 7 section 12 of the 1969 Act, obviously we have considered
 8 that very carefully. It's something we already had in
 9 our minds. And, subject to any submissions anybody
 10 wants to make about particular arguments, it seems to us
 11 that everybody should be given a certificate across the
 12 board. I don't include in that Mr Hofmeyr's clients
 13 because we'll deal with that separately, but everybody
 14 who was a party or an intervener should be given
 15 a certificate across the board. So that may shorten
 16 matters.
 17 Equally, subject to a few, or possibly only, in our
 18 case, one caveat, we would have granted permission to
 19 appeal to the Court of Appeal in respect of the grounds
 20 of appeal raised by each of the parties. There is one
 21 caveat about general condition L which we think is,
 22 putting is bluntly, a load of rubbish, but Mr Turner can
 23 seek to persuade us to the contrary. That's the first
 24 point.
 25 The second point, which goes really to, I think,

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1 paragraph 13 of the declarations, is that whatever it
 2 was that we said in the judgment in relation to Arch and
 3 Ecclesiastical was intended to be of general application
 4 to all the relevant policies. If we didn't make that as
 5 clear in the judgment as we should have done,
 6 I apologise, although I think we both feel we made it
 7 pretty crystal clear in paragraphs 283 and I think it's
 8 347 to 351. So we will certainly be proceeding on that
 9 basis.
 10 I hope those two points do help?
 11 MR EDELMAN: Yes, they do. I wonder if, having given
 12 an order for the agenda, it may be that with just one
 13 point we can actually then miss out certificates
 14 completely.
 15 There's only one observation that we had. We quite
 16 agree -- the FCA accepts that all the insurers should
 17 have the opportunity to appeal whatever points they want
 18 to appeal. There's a question about the form of order
 19 that's made. If I can give you an example of one
 20 defendant's order at {O/8/1}, if that can come up on the
 21 screen. This is Argenta. Yes.
 22 You'll see that if we go to the second page
 23 {O/8/2} -- oh no, it's the first page, just the bottom
 24 of the first page. It cut off on my screen and I've
 25 just realised {O/8/1}. It's in relation to the proposed

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1 grounds appended to, going to the next page {O/8/2}, the
2 application, there's a sufficient case to appeal. Now,
3 that's a form of order that we are content with.
4 Contrast that with the Arch notice at {O/6/1}, which
5 merely gives the certificate, and then if we go to the
6 second page {O/6/2}, as you'll see, there's no reference
7 to the grounds of appeal.

8 What we would say, and what we've done in our draft
9 order, is to refer in the draft order to the grounds of
10 appeal that we have identified and, as you've seen,
11 Argenta did the same. Arch haven't.

12 What we would submit is, just so that everybody
13 knows where they stand, that the draft orders should
14 refer to the grounds of appeal that the insurers have
15 identified, just so there's certainty going forward as
16 to the points that people are raising.

17 That's not intended to be -- that's not for the
18 purposes of being restrictive: it's just so that we all
19 know where we're starting from.

20 LORD JUSTICE FLAUX: Well, Mr Edelman, let's leave it where
21 it is in the agenda. It's my fault for raising it at
22 the outset. Others can, no doubt, cogitate on what
23 you've said, but on the face of it, it seems to me
24 eminently sensible that we have certainty as to what it
25 is that their Lordships are being invited to decide in

1 relation to permission, and what it is that we're giving
2 a certificate for.

3 There's an issue, which we'll obviously hear
4 submissions about, about whether RSA should have
5 a certificate in relation to RSA 4 because of the
6 definition of "vicinity". I think our current view is
7 we see the force of the point that's made by the
8 interveners but it seems to us on balance that the case
9 is of sufficient importance generally that it would be
10 artificial to cut out RSA 4, and we're also conscious
11 that, for better or worse, RSA 4 is a widely used
12 wording in the market.

13 MR EDELMAN: Well, as I have said, my instructions from the
14 FCA are, in the spirit of the framework agreement, not
15 to stand in anybody's way, subject, of course, to the
16 court's own view. The court must exercise its own
17 judgment, of course, on that, but we don't intend to
18 address any submissions on that.

19 LORD JUSTICE FLAUX: No, okay.

20 So far as the declarations, so far as logistics are
21 concerned, Mr Edelman, is it intended that you go
22 through all of them, or simply that you go through, as
23 it were, each one, or the groups -- for example, 8.2,
24 8.3 and 8.4 really go together -- and you make your
25 submissions and then whoever is leading for the insurers

1 makes his or her submissions and then we give a ruling
2 on it or what?

3 MR EDELMAN: My Lord, I was going to propose that, that
4 I deal with the prevalence issues first, then the
5 causation issues, then there's one QB point, and then
6 the rest is all Hiscox.

7 LORD JUSTICE FLAUX: Yes, I think that's probably right. It
8 will involve, potentially, Mr Justice Butcher and
9 I retiring from this meeting into our private parallel
10 Skype room so that we can discuss things. It may be we
11 will do that, but I think that's the right way forward,
12 subject to my Lord having different views.

13 Submissions by MR EDELMAN

14 MR EDELMAN: I'm grateful. So let's start with the
15 prevalence issues, and that starts with the issues on
16 paragraph 8.2, which starts -- the latest version is
17 {N/11/2}, and it's at the foot of the page:

18 "The burden of proof is on policyholders to prove
19 the presence of COVID-19 within the relevant policy
20 area. The following types of evidence could be used in
21 principle to discharge that burden on policyholders to
22 prove the presence of COVID-19 within the relevant
23 policy area on a particular date."

24 And the first topic on {N/11/4} is the insertion of
25 the word "reliable" in (e) and (f), which you can see in

1 blue, which the insurers propose, and the issue is as to
2 whether that word should be included, which would have
3 the effect of specifying that a type of evidence that
4 can be relied on is a reliable document, so that, in
5 other words, the policyholder has to prove the
6 reliability of a distribution-based analysis, or
7 an undercounting analysis, as part of the declaration.

8 Our essential submission is that this was not part
9 of the court's judgment. It wasn't part of the judgment
10 that reliability was a specific criterion for
11 discharging the burden of proof.

12 The limited issue --

13 LORD JUSTICE FLAUX: We didn't have any evidence -- we
14 didn't have any evidence as to the reliability of any
15 particular (overspeaking) --

16 MR EDELMAN: No, and it wasn't actually what you were being
17 asked to consider.

18 If we go to paragraph 539 -- I'm sure my Lords are
19 very familiar with this -- at {N/1/151}. Those were the
20 questions, at paragraph 539, and in particular we're
21 focused at this stage on 1:

22 "The type(s) of proof which could be sufficient to
23 discharge the burden of proof on insureds ..."

24 Now, it's right to say that at 556 on {N/1/155}, if
25 we can move forward to that, the insurers did refer to

1 the concept of reliability and made submissions about
 2 that.
 3 LORD JUSTICE FLAUX: The last sentence of that paragraph
 4 makes it clear that the insurers were also saying that
 5 we didn't have the evidence to decide an issue of
 6 reliability. So, in principle, it seems to me -- and
 7 I think my Lord agrees -- that we weren't dealing with
 8 that and, therefore, it would have been inappropriate to
 9 include the word "reliable" in the declarations we made.

10 MR EDELMAN: My Lord, if that's the position, I perhaps
 11 needn't elaborate the point any further.

12 The point that my Lords went on to deal with is at
 13 576 and 579, which is on {N/1/161}, we start with. In
 14 the third line at the end you say:

15 "The provenance of a particular report, or the fact
 16 that it has been relied on by the Government, may assist
 17 in the assessment of whether it is reliable, and whether
 18 it is indeed the best available evidence, but it does
 19 not add much to the question of whether it could
 20 discharge the burden of proof once we assume it is the
 21 best available evidence."

22 So that was really -- that was actually
 23 addressing -- it's a passage the insurers rely on but,
 24 in fact, was addressing issue 2, if we go back to
 25 {N/1/151}, and although insureds rely on that passage,

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1 that's not what the court was addressing. The second
 2 one was:

3 "On the assumption that the matters pleaded by the
 4 FCA represent the best evidence available, whether it is
 5 sufficient as a matter of principle to discharge the
 6 burden of proof."

7 Then just finally at 579, which is the other passage
 8 that the court relies on {N/1/162}, again this is
 9 addressing question 2:

10 "The insurers have conceded that
 11 a distribution-based analysis, or an undercounting
 12 analysis, could in principle be used to discharge the
 13 burden of proof on an insured. The insurers have
 14 accepted that insureds can seek to rely on the specific
 15 reports identified in this case. Unlike the defendants
 16 in Equitas, the insurers do not suggest that absolute
 17 precision is required and that otherwise the claims will
 18 fail. The real issues between the parties were as to
 19 the reliability of the particular methodologies
 20 introduced by the FCA."

21 As the court judgment reflected, we accepted that
 22 the court couldn't reach a conclusion on that, but what
 23 we were saying is in the COVID situation are these
 24 reports the sort of evidence that can be presented
 25 before the court? Whether they do discharge the burden

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1 of proof is when reliability comes in, not whether the
 2 court will say: no, that's not a type of evidence you
 3 can refer to at all.

4 So that was just in anticipation of any submissions
 5 that are made, but we submit that reliability should not
 6 be included.

7 I'll deal with any further points in reply. Can
 8 I move on, then, to the wording of 8.2(f), which is
 9 {N/11/4}. This really follows on from the reliability
 10 issue, but we were just merely -- this is, again, only
 11 addressing the type of evidence, and we submit that our
 12 addition in red "such as the reports produced by
 13 Imperial College ... and Cambridge University", the
 14 correct addition to the declaration, just to make it
 15 clear what type of evidence it is that we are referring
 16 to, without saying anything about the reliability of
 17 those reports, just merely to show that that is what the
 18 declaration -- the type of evidence the declaration is
 19 assessing -- is addressing.

20 8.3, this deals with the ONS -- with the reported
 21 case data, and in particular -- there's the wording we
 22 suggest at 8.3, which we suggest should be included,
 23 just to record that that is what insurers actually
 24 conceded in the agreed facts 3, and it's recorded in the
 25 judgment, and then there's a point on 8.4 as well, which

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1 I'll come to.

2 But just on the concession --
 3 LORD JUSTICE FLAUX: This reflects, doesn't it, what was
 4 said in the first two sentences of 579?

5 MR EDELMAN: Yes, my Lord.

6 LORD JUSTICE FLAUX: It's no more than that.

7 MR EDELMAN: Well, 579 is addressing averaging and
 8 undercounting. This 8.3 is addressing the other
 9 underlying data, which -- we start with 569 on
 10 {N/1/159}, and it's there that you record the concession
 11 that we seek to record in 8.3.

12 LORD JUSTICE FLAUX: Yes, sorry, I got the wrong paragraph,
 13 Mr Edelman. I meant 569.

14 MR EDELMAN: Yes, and that just records the agreed facts.

15 As we understand it, there is also no dispute that
 16 those are, as recorded in 569, in principle capable of
 17 discharging the burden of proof as recorded there.

18 The real dispute between the parties, insofar as
 19 there was one, but in reality probably -- as 579
 20 records, probably not, was whether averaging and
 21 undercounting methodologies can be used -- are a type of
 22 evidence that can be used and, in principle, could
 23 discharge the burden of proof, depending on what the
 24 evidence actually is.

25 LORD JUSTICE FLAUX: Is it really -- I think what may be the

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1 sticking point so far as insurers are concerned, if you
2 look at your 8.3, is the use of the words "and will
3 discharge the burden of proof", as opposed to, say,
4 saying "are in principle capable of demonstrating the
5 presence of COVID-19 and capable of discharging the
6 burden of proof", because insurers leave open, at least
7 as matters currently stand, the possibility that the
8 burden of proof wouldn't be discharged even if that were
9 the best evidence available.

10 I don't know, I mean I'm speculating, and we'll hear
11 what insurers say.

12 MR EDELMAN: Our understanding is that actually there isn't
13 a dispute that if there is a reported case -- because
14 here we are referring to the particular types of -- the
15 death data and reported cases we say are in principle
16 capable of demonstrating the presence of COVID-19, and
17 will discharge if they are the best available evidence
18 in a particular case.

19 So the "capable" bit is already incorporated at the
20 beginning of the declaration.

21 MR JUSTICE BUTCHER: But how can we decide now that they
22 will discharge a burden of proof in a particular case?

23 MR EDELMAN: Well, all that's saying is that they will
24 discharge it if they are the best evidence of what the
25 incidence is. But if my Lords wish to substitute those

1 words for "and are capable of", I'm not going to spend
2 a lot of time seeking to --
3 LORD JUSTICE FLAUX: I would have thought that saying "and
4 are capable of discharging the burden of proof", rather
5 than "and will discharge the burden of proof", better
6 reflects the point that we made in the judgment which
7 was that there was only so far that we could go.

8 MR EDELMAN: In 574 at 161, {N/1/161}, because this was on
9 question 2:

10 "The disagreement between the parties on this
11 question was limited to the use of the methodologies of
12 averaging and undercounting. It was not suggested by
13 the insurers that the particular types of underlying
14 data pleaded by the FCA... would not discharge the
15 burden of proof if they were the best available evidence
16 in a particular case."

17 LORD JUSTICE FLAUX: I think the point my Lord made just now
18 is that -- I think we both would feel uneasy in saying
19 it will discharge the burden of proof in circumstances
20 where we haven't got, as it were, any actual evidence
21 upon which to reach that conclusion. It's a pretty
22 stark conclusion that shuts out any debate in the
23 future.

24 We expressed the hope at the end of 579, I think it
25 is, that, you know, this will all be sorted out

1 sensibly, but at the moment, as matters stood at the
2 hearing, it hadn't been finally sorted out, there were
3 still these issues between the parties.

4 Anyway, Mr Edelman, we have your submission.

5 MR EDELMAN: You've got my submission on that. I'm not
6 going to labour the point.

7 8.4 is an esoteric point about the reported cases.
8 It relates to the reported cases if we go back -- sorry,
9 in the declaration it's {N/11/5}. This is merely
10 recalling that the true number of individuals who have
11 been infected -- note the past tense -- on or by
12 relevant dates is at least as great as the number of
13 reported cases for those dates for that zone, and it
14 then explains the point about cumulative totals.

15 This ties in with the type of evidence described in
16 8.2(d) on {N/11/4}. This is the type of evidence that
17 can be relied on:

18 "Data published by the UK Government recording the
19 number of daily lab-confirmed positive tests ... taking
20 into account the Reported Cases on a particular date in
21 a particular nation, region, UTLA or LTLA together with
22 the Reported Cases two to three days either side of that
23 day as being active on that particular date..."

24 That's an agreed declaration and the judgment at
25 572 -- that's {N/1/160} -- addresses that particular

1 point. So that is a particular type of evidence, and
2 the parameters of the evidence are dealt with, the two
3 to three left-hand day point is dealt with, and that's
4 addressed, as I say, in 8.2(d)(i).

5 What 8.4 is doing is reflecting simply what insurers
6 agreed in agreed facts 3. So if we could have {C/5/2}.
7 It says it addresses the fact that:

8 "... the true number of people infected [in 2.2]
9 during March 2020 is much higher than those who tested
10 positive for COVID-19 during March 2020."

11 And if we also look at page 6, please -- I think
12 it's page 6. No, it's {C/5/15}, I'm sorry. Is that the
13 right number? No. Sorry, it's paragraph 41, so if we
14 can go back a page. Maybe it's 16, sorry, it's
15 {C/5/16}. There we are:

16 "The actual presence of COVID-19 in the UK
17 in March 2020 would have been much higher than was
18 reflected by the number of Reported Cases. However, the
19 extent of the difference ... is not agreed."

20 And if we go back to the declaration at 8.4, that's
21 {N/11/5}, you will have seen the reference to "much
22 higher", and all we're saying is trying to reflect those
23 concessions that the number of individuals is at least
24 as great as the number of reported cases. And, of
25 course, that includes the cumulative cases for that

1 purpose because we're just here declaring how many
2 people had COVID, who have been infected with COVID on
3 or by the relevant dates in March.

4 So we submit this should be uncontroversial and
5 we're surprised that it's objected to. What the
6 insurers are trying to do with their added words is --
7 they're perhaps missing the point of this declaration
8 because the words they seek to add are actually only
9 relevant to the point that's already been addressed,
10 I showed you, in 8.2(d), the type of evidence where
11 we've confined it in accordance with the judgment to two
12 or three days either side of the day.

13 If we go back to {N/11/4} in this document, we've
14 confined the type of evidence to reported cases two or
15 three days either side of -- a reported case on
16 a particular date, reported cases two or three days
17 either side of that date. So we've already confined the
18 type of evidence in relation to reported cases on which
19 a policyholder can rely. So you don't need the
20 cumulative point in 8.4. It's just not relevant to it.

21 My Lord, those are my submissions on prevalence.

22 LORD JUSTICE FLAUX: Thank you, Mr Edelman. Now, who is
23 making the running for the insurers on this point?

24 Submissions by MR TURNER

25 MR TURNER: I am, my Lord. Can I take those in order, and

1 can I preface my submissions with the observation that
2 the declarations which your Lordships make are
3 declarations which will doubtless be used by
4 fact-finding tribunals at different levels, but
5 including adjudicators in the Financial Ombudsman
6 Service who are adjudicating upon complaints made, and
7 what may seem obvious nuance to those of us who have
8 lived, breathed, eaten and slept with this case for
9 a number of months, may not be obvious to those who
10 actually have to look at your declarations and work out
11 what they mean, and the aim of the declarations is that
12 they should be simple and obvious, without having to go
13 back to the judgment and debate their scope.

14 In relation to 8.2, if we can go back, please,
15 {N/11/4}, please. The first insertion that we propose
16 at (e) ties in also with the first insertion that we
17 propose in relation to (f) in the second line, and those
18 amendments, we say, are properly required to reflect the
19 true nature of the concessions that had been made in
20 relation to the use of distribution-based and
21 undercounting methodologies.

22 We did not concede -- the defendants did not concede
23 that any such methodologies could be used by
24 policyholders and, as you recorded in paragraphs 556 and
25 560 of the judgment, the extent of the concession made

1 was that policyholders could seek to prove an occurrence
2 by using reliable analyses.

3 The introduction in the FCA's proposals in relation
4 to subparagraph (f) of a reference to the Imperial
5 College and Cambridge University reports is, in our
6 submission, apt to mislead fact finders, particularly
7 hard-pressed FOS adjudicators, into thinking that some
8 form of endorsement has been given in relation to the
9 Imperial College and Cambridge analyses, when, in fact,
10 no such endorsement has been provided, and we would
11 refer you to the judgment at 559.

12 LORD JUSTICE FLAUX: Would your concern be addressed if we
13 deleted the words in red in (f), and didn't include the
14 word "reliable"?

15 MR TURNER: Well, my Lord, we would prefer to include the
16 word "reliable", but certainly the concerns about the
17 reference to Cambridge and Imperial would be addressed
18 by their omission.

19 LORD JUSTICE FLAUX: Yes.

20 MR JUSTICE BUTCHER: So there was simply no reference to
21 those reports at all?

22 MR TURNER: Yes. I mean, we were prepared to offer
23 a formulation where there could be a reference to them,
24 but the omission of reference leaves the ground neutral
25 when it comes to further argument in front of

1 a fact-finding tribunal.

2 LORD JUSTICE FLAUX: In one sense one can see the force of
3 the point because certainly the Imperial analysis has
4 come under quite a lot of criticism in the two and a bit
5 months since the end of the trial.

6 MR TURNER: Exactly, and the difficulty with both those
7 analyses is they may have been the best shot that
8 someone could have back in May or June or July, but the
9 state of the art doesn't stand still, and therefore it's
10 simply not appropriate.

11 LORD JUSTICE FLAUX: That's that point.

12 MR TURNER: That's that point.

13 LORD JUSTICE FLAUX: Okay.

14 MR TURNER: But on the question of "reliable", all I would
15 do is, again, to remind you of what you said in
16 paragraph 579, where you recorded that the real issues
17 between the party were as to the reliability of the
18 particular methodologies introduced by the FCA.

19 My Lord, paragraph 8.3, my Lord, Lord Justice Flaux,
20 has already identified the difficulty which insurers
21 have with this particular declaration. The suggestion
22 that was made is that the word "will" should be replaced
23 with "are capable of discharging", so "will discharge"
24 would be replaced with "are capable of discharging".

25 My Lord, the reservation which insurers would still

1 have in relation to that formulation is, again, it
 2 introduces a distinction which may be well understood by
 3 those of us who are participating in today's hearing,
 4 but it may introduce a distinction which is elusive to
 5 fact finders seeking to apply the declarations that
 6 your Lordships make.
 7 To the extent it is necessary to do so, those fact
 8 finders can have reference to your judgment, but it
 9 isn't necessary or, we would suggest, helpful to try to
 10 encapsulate what may be controversial matters into
 11 a declaration.
 12 MR JUSTICE BUTCHER: Is one possibility that this should
 13 read, in 8.3, up to the word "COVID-19", and then end
 14 there?
 15 MR TURNER: I think my difficulty with that, my Lord, is
 16 I can't find "COVID-19" in 8.3.
 17 LORD JUSTICE FLAUX: Yes, you can.
 18 MR TURNER: Can I?
 19 LORD JUSTICE FLAUX: Yes.
 20 MR TURNER: Sorry, I was looking at an old version.
 21 LORD JUSTICE FLAUX: And "will discharge".
 22 MR TURNER: Could we go back, please, one page? Certainly
 23 if a full stop were put after "COVID-19".
 24 LORD JUSTICE FLAUX: So in other words we wouldn't be making
 25 any sort of declaration at all about what the position

1 was in relation to the burden of proof at this point?
 2 MR TURNER: Yes.
 3 LORD JUSTICE FLAUX: Leaving it entirely to the fact finders
 4 in any given case?
 5 MR TURNER: Yes, my Lord.
 6 LORD JUSTICE FLAUX: Very well.
 7 MR TURNER: 8.4, really this is a very short point. We do
 8 not suggest that the FCA's formulation of 8.4 is
 9 faithfully reflecting the concessions made. What it is
 10 doing is seeking to drag the court further than it was
 11 prepared to go in its judgment, and we can see that in
 12 paragraph 572 of the judgment, if we could just have
 13 that very briefly on screen. That's {M/1/160}.
 14 The FCA's formulation raises -- is apt to set hares
 15 running, and in our submission the insurers'
 16 formulation, as in blue, faithfully reflects what --
 17 both the concession made by insurers and also the views
 18 expressed by the court in paragraph 572.
 19 So we would invite you -- and the concession that we
 20 made was recorded in paragraph 549, to which you've
 21 already been taken, and we say that if the declaration
 22 is to be there at all, it should accurately reflect the
 23 terms of the concession rather than seeking to go beyond
 24 it and arguing further points.
 25 LORD JUSTICE FLAUX: What is the problem with the words

1 "[who have been]" and "[or by]", in the first part of
 2 8.4? I can't see any problem with those. I understand
 3 your submission about the other part of it.
 4 MR TURNER: Well, again, the distinction between "on" and
 5 the words "or by" and the importance of those words may
 6 be elusive to the fact-finding tribunal.
 7 LORD JUSTICE FLAUX: Right, okay. So those are your
 8 submissions on --
 9 MR TURNER: Those are my submissions on that. I'm not
 10 dealing with the next points. I have one fleeting cameo
 11 at a later stage.
 12 LORD JUSTICE FLAUX: Well, we'll look forward to seeing your
 13 fleeting cameo later, Mr Turner.
 14 MR TURNER: Thank you.
 15 LORD JUSTICE FLAUX: Thank you very much.
 16 Mr Edelman. Mr Edelman, you're still on mute.
 17 Submissions in reply by MR EDELMAN
 18 MR EDELMAN: Apologies, I'll get used to it one day.
 19 I'm not going to say anything about whether or not
 20 it's appropriate to delete the reports, but certainly
 21 I would submit that the word "reliable" should not be in
 22 there. It's not appropriate, it's not something that
 23 was addressed in the judgment, and what is there is
 24 simply addressing a type of evidence, not its quality,
 25 and that's the simple point. That's what 8.2 is

1 addressing: it's addressing types of evidence, not
 2 addressing their quality.
 3 LORD JUSTICE FLAUX: Okay.
 4 MR EDELMAN: And if my Lords feel that removing the
 5 reference to those reports would add to the clarity of
 6 the declaration and that it only relates to type, so be
 7 it. I'm not going to go to the stake on that.
 8 LORD JUSTICE FLAUX: No.
 9 MR EDELMAN: As for 8.3, this is actually one of the
 10 questions posed, and it's recorded -- as I showed you,
 11 it's recorded in your judgment and to suggest that
 12 somehow you shouldn't answer it because people might not
 13 understand the answer is, we submit, not appropriate.
 14 Can I just add one point about the additional words
 15 in red about the cumulative total. This is on {N/11/5}.
 16 The only reason we included those words was simply as
 17 a matter of fairness because that is what is in the
 18 agreed facts 3, which I had in front of me with a page
 19 number on and I've just lost it. But it's -- if
 20 my Lords would give me one moment just to get it back
 21 again. It's in {C/5/8}, right, paragraph 23:
 22 "The Insured can prove the presence of at least one
 23 case ... within the Relevant Policy Area ... if, on that
 24 date ... lab-confirmed case ... for the relevant [policy
 25 area] LTLA is at least one, and that LTLA is entirely

1 within the Relevant Policy Area ... The Underlying Data
 2 would also confirm the cumulative number of Reported
 3 Cases up to and including [the] particular date within
 4 the Relevant Policy Area, although this makes no
 5 allowance for those who have recovered from COVID-19."
 6 Then there's the footnote 21, which deals with the
 7 infectious period. So you'll see what's said in the
 8 agreed facts, and all we're trying to do is just
 9 reflected the agreed facts in paragraph 8.4. So we say
 10 they should be in there and the court should be
 11 concerned to record what has either been agreed or
 12 decided by the court, and if fact finders want to
 13 understand it better, or there's a dispute about what it
 14 means, they can refer to the judgment for a better
 15 understanding.
 16 LORD JUSTICE FLAUX: Right, okay. Thank you very much.
 17 We'll just retire briefly to our parallel room. So
 18 don't go too far away, anybody. I'll just turn my
 19 camera off and we'll be a minute or two.
 20 (11.15 am)
 21 (Pause)
 22 (11.18 am)
 23 LORD JUSTICE FLAUX: Right, we'll just wait for my Lord to
 24 join us.
 25

25

1 Ruling
 2 LORD JUSTICE FLAUX: Right, so far as paragraph 8.2 is
 3 concerned, as we indicated during the course of
 4 argument, we don't propose to include the word
 5 "reliable". Having heard the arguments, we don't
 6 propose to include any of the passages in either red or
 7 blue in the draft order; in other words, it will stay as
 8 it was in the original black. I hope that's clear.
 9 8.3, it seems to us that the real concern of
 10 insurers is about the use of the word "will". During
 11 the course of argument we suggested "are capable of
 12 discharging". My Lord has suggested a more elegant and
 13 shorter way of dealing with it, which is just to say
 14 "may discharge" rather than say "will discharge", which
 15 we think covers the same point. So I think we would be
 16 inclined to say "and may discharge". If anybody wants
 17 to raise any objection to this, we'll obviously hear
 18 what they have to say.
 19 So far as 8.4 is concerned, we consider that the
 20 FCA's formulation is entirely satisfactory and, to be
 21 honest, we can't understand what the fuss is on the
 22 insurers' part about that. So the red additions,
 23 Mr Edelman, in 8.4 will stand.
 24 MR EDELMAN: I'm grateful, my Lord.
 25

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1 Submissions by MR EDELMAN
 2 MR EDELMAN: If we can now move on to causation, we have --
 3 going back to {N/11/5}, having considered insurers'
 4 proposal, we have a proposal at 10. But it may be best
 5 to wait and see what's said about that because there's
 6 very little difference between the parties. It looks as
 7 though it's just a matter of language. Shall we see
 8 what's said about our redraft of 10? Unfortunately time
 9 ran out but, as far as I know, I don't think there's
 10 an issue of principle arising out of 10.
 11 LORD JUSTICE FLAUX: Well, I don't think we've seen
 12 an up-to-date proposal from you. We're working on the
 13 draft that came first thing this morning.
 14 MR EDELMAN: Yes, well, that's it. That's in red. That's
 15 the bit in red on 11 --
 16 LORD JUSTICE FLAUX: I don't think I'd picked up that you
 17 had made any changes to that.
 18 MR EDELMAN: No, maybe -- perhaps if we hear what's
 19 objectionable --
 20 LORD JUSTICE FLAUX: Speaking for both of us, really, our
 21 initial reaction was that this was a storm in a teacup.
 22 MR EDELMAN: Yes, I agree.
 23 LORD JUSTICE FLAUX: And we thought that the insurers'
 24 formulation more closely reflected what we said in the
 25 judgment. But we'll hear what the insurers say and if

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1 you want to say something in reply, you can.
 2 Submissions by MR SALZEDO
 3 MR SALZEDO: My Lord, this has been allocated to me, which
 4 probably reflects the fact that nobody thinks it is
 5 a matter of enormous substance.
 6 We do not see it as having a different meaning, the
 7 two formulations, but we submit that ours is shorter and
 8 clearer, and therefore more helpful to the world reading
 9 it.
 10 It also has the virtue of using the phrase
 11 "indivisible clause", which is a term that was used in
 12 the FCA's skeleton argument for trial. Your Lordship
 13 has used it several times in the judgment, and it is the
 14 term that expresses a core part of your Lordship's
 15 reasoning, and several insurers have referred to it in
 16 their grounds for appeal.
 17 I can go to passages in the judgment to show
 18 your Lordship that what we've said in our blue is true
 19 to the judgment, but it may be that's unnecessary, and
 20 I accept the red is as well.
 21 LORD JUSTICE FLAUX: No, you don't need to --
 22 MR SALZEDO: My Lord, that's all it comes to.
 23 LORD JUSTICE FLAUX: Yes, thank you very much.
 24 Submissions in reply by MR EDELMAN
 25 MR EDELMAN: My Lord, can I just say it's a matter of which

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1 language you prefer. There's no great --
 2 LORD JUSTICE FLAUX: I don't think we need to retire on this
 3 one. I think we'll take the insurers' blue wording.
 4 MR EDEY: My Lord, it's Philip Edey here for the
 5 interveners.
 6 LORD JUSTICE FLAUX: Yes.
 7 MR EDEY: Can I just say one thing about that wording. The
 8 one concern that the interveners have about it is that
 9 it gives the impression that all government response of
 10 any sort to local cases is to be treated in the same way
 11 as part of one indivisible clause. What we're very
 12 concerned about is, with all these local lockdowns going
 13 on, it is not hereafter said by insurers that, as
 14 a result of that declaration, your Lordships have
 15 decided that a local response by the government would be
 16 part of the same single indivisible cause. The concern
 17 is --
 18 LORD JUSTICE FLAUX: The answer to that point, Mr Edey,
 19 would be that there was no -- other than -- we touched
 20 on examples by reference to the Leicester lockdown,
 21 which I think at the time was the only one there was,
 22 that no part of the actual case addressed the issue of
 23 local lockdowns. So insurers try and use this for some
 24 further purpose hereafter, the short answer to it is: it
 25 wasn't dealt with by the court. We're making

1 declarations about what we ruled on, and this is what we
 2 ruled on.
 3 MR EDEY: My Lord can I just suggest one qualification then,
 4 if your Lordships were to make that clear, to insert the
 5 word "national" before "governmental" that would make it
 6 clear that, as your Lordship has just said, the only
 7 thing dealt with in the case was the national responses
 8 which were pleaded by the FCA.
 9 LORD JUSTICE FLAUX: Mr Salzedo, do you want to say anything
 10 about that?
 11 MR SALZEDO: My Lord, I'm not totally sure that it is right
 12 to say that the court didn't deal at all with that. In
 13 a sense, as your Lordship rightly says, you referred to
 14 local lockdown, and I think that was in the context of
 15 my clients having explained how we said that would work,
 16 and your Lordships in fact said that it would work
 17 differently to how we said it would work and that it
 18 would be quite wrong to make a distinction depending on
 19 whether the local lockdown would not have incurred were
 20 it not for the cases within the 25-mile zone. So I'm
 21 not sure that it's actually right to say that your
 22 Lordships didn't deal with it.
 23 That said, at the moment I'm struggling to see what
 24 the nefarious use to which insurers might put this
 25 declaration without the word "national" actually is.

1 So, my Lord, that's what I would say about it.
 2 LORD JUSTICE FLAUX: Well, I think, unless my Lord has
 3 a different view, I think there's an element of tilting
 4 at windmills here, Mr Edey. I think we will leave it as
 5 it is. I think it reflects what it was that we were
 6 dealing with, and what happens in the future happens in
 7 the future. We can't legislate for everything.
 8 MR EDEY: My Lord.
 9 LORD JUSTICE FLAUX: Right. So it will be as the insurers
 10 propose in paragraph 10.
 11 Next, Mr Edelman?
 12 Submissions by MR EDELMAN
 13 MR EDELMAN: My Lord, {N/11/6}, 11.2(a) and some words that
 14 Argenta seek to add which they admit in paragraph 5 of
 15 their skeleton goes beyond the judgment.
 16 The problem with this addition is that it would
 17 involve consideration of the timing of the outbreak in
 18 the context of the periodic reviews of restrictions that
 19 the government undertook and announced it would be
 20 undertaking.
 21 Therefore the continuation of the restrictions after
 22 the outbreak in a relevant policy area could be said to
 23 be causative of the continuation of the restrictions.
 24 This would be a question of fact if it arises, but given
 25 the figures that the court were shown and which is in

1 the agreed facts for the national prevalence of COVID,
 2 this is unlikely to be a significant point and can and
 3 should be left to be dealt with on individual facts.
 4 Maybe that perhaps explains why the parties didn't
 5 really address this point in detail in argument, and it
 6 certainly wasn't addressed in the judgment, and I don't
 7 think anybody -- nobody has suggested that the judgment
 8 had failed on this aspect to address something the
 9 parties had asked them to address.
 10 In any event, a policyholder without a reported case
 11 or other official data to show an outbreak in a relevant
 12 policy area may instead seek to rely on a combination of
 13 undercounting and averaging or other evidence to prove
 14 on the balance of probabilities that there was
 15 an outbreak before government action. But essentially
 16 this wasn't a variant of facts that was specifically
 17 considered in the judgment or with any focus by the
 18 parties. It is fact-sensitive in many respects, and we
 19 submit the court should steer clear of making
 20 declarations about it. That's our reason for objecting
 21 to it.
 22 LORD JUSTICE FLAUX: Mr Salzedo, you again. You're -- you
 23 need to unmute yourself.
 24 Submissions by MR SALZEDO
 25 MR SALZEDO: I've got my own microphone turned off.

1 My Lord, yes, it's me again, not for the reason
 2 stated on the sheet at {N/11}, which would suggest it's
 3 a special point of my clients. That's not right. We
 4 were the ones who communicated it on behalf of insurers.
 5 But as it happens it is me dealing with it, my Lord.
 6 As Mr Edelman says, we accept that the words we seek
 7 to insert in 11.2(a) are not in the judgment, but we say
 8 that it's important to make clear what the judgment
 9 means in relation to this scenario. I'm not sure why my
 10 learned friend says that it's not important. It may
 11 well be important to -- it may well be very important to
 12 some policyholders.
 13 The difference relates to a particular scenario that
 14 could arise with disease clauses. Perhaps before
 15 I explain that, maybe I just say this as well in case
 16 I forget later: the question I'm about to raise is
 17 similar to one that arises on the trends clause, for
 18 which your Lordships will be treated to an upgrade of
 19 counsel on the defendants' side, and it may be
 20 your Lordships will prefer to decide it after having
 21 heard those submissions as well.
 22 But going back to this clause, the scenario which
 23 causes an issue that needs to be resolved is where the
 24 chronology runs as follows:
 25 First, there's a relevant government response to

1 COVID such as the 21 March regulations or the 26 March
 2 regulations. Those have an impact on a policyholder's
 3 business but at that stage there is no COVID in the
 4 relevant radius.
 5 As from some later date, maybe 15 April just for the
 6 sake of argument, it is established that there is COVID
 7 within the radius of that policyholder.
 8 The question of substance is whether your Lordships
 9 have held that regulations passed on 21 or 26 March, and
 10 the effect of those regulations on the policyholder's
 11 business, were following, to take the RSA 3 wording, or
 12 as a result of, to take the Argenta wording,
 13 an occurrence of COVID within the radius on, for
 14 example, 15 April.
 15 Now, we submit that your Lordships have not held
 16 that, but in any event, whether I'm right about that or
 17 not, it is necessary for insurers and policyholders
 18 alike to know whether or not you have held that. This
 19 judgment is undoubtedly relevant to the question what
 20 happens on that scenario, and it is essential to know
 21 what your Lordships in fact have said about it, whereas
 22 the FCA's draft declaration and, as I understand it,
 23 supported by Mr Edelman's oral submissions just now,
 24 seem to leave this point open for future argument which,
 25 in our submission, is the worst of all possible worlds.

1 You may well be right that it's a scenario --
 2 MR JUSTICE BUTCHER: Mr Salzedo, I think one of the points
 3 that Mr Edelman has made, or at least just made, is that
 4 it is at least possible to conceive that the
 5 restrictions were continued after the date even if the
 6 first case of COVID within the radius was at some
 7 subsequent point after the initial institution of the
 8 restrictions, that they may have been continued by
 9 reason of such COVID, and I'm not sure that that is
 10 an issue which is fully catered for in your proposed
 11 changes.
 12 MR SALZEDO: Well, my Lord, no. We are seeking to persuade
 13 your Lordships that what you have decided so far is not
 14 that. If I'm wrong about that, then it may be that the
 15 FCA ought to be proposing some wording, or
 16 your Lordships will give us some wording, expressing
 17 whatever your Lordships have decided about this.
 18 But I'm seeking to persuade your Lordships at the
 19 moment that you have certainly not decided that, as
 20 a matter of generality, cases on 15 April caused
 21 restrictions that were made earlier than that, and I --
 22 MR JUSTICE BUTCHER: My immediate reaction is we haven't
 23 decided that, but we equally haven't gone into the
 24 question of whether they may have been continued because
 25 of that. We just haven't dealt with those.

1 LORD JUSTICE FLAUX: We haven't dealt with an issue as to
 2 whether or not there might be coverage under particular
 3 policies in the scenario which you've postulated. It
 4 just wasn't argued before us at all.
 5 Presumably, Mr Salzedo, looking at the position of
 6 your particular clients, this is an Isles of Scilly
 7 point, isn't it? Because the Isles of Scilly didn't
 8 have any COVID but it now does have COVID. So I suppose
 9 that if there are policyholders of Argenta who make
 10 a claim who own holiday cottages in the Isles of Scilly,
 11 this point may come up, but the difficulty that I see is
 12 that we just haven't explored it at all.
 13 Then my Lord's point about continuation, I can see
 14 the force in that, but we would need detailed
 15 submissions from those affected on this point, which we
 16 don't have.
 17 MR SALZEDO: At the moment, my Lord, assuming then that
 18 I don't need to persuade your Lordships through the
 19 judgment of the proposition that your Lordships did not
 20 decide, that occurrences backwardly caused earlier
 21 restrictions, assuming that, then what the difficulty is
 22 with 11.2(a) as drafted by the FCA is it does appear to
 23 imply that any restrictions caused by COVID in the UK
 24 are necessarily among those to be taken out of the
 25 counterfactual when considering basic causation,

1 including those which were imposed earlier .
 2 Now, if the position is that your Lordships do not
 3 consider yourselves to have decided anything about, for
 4 example, the idea that perhaps restrictions were
 5 continued as a result of the cases within the region and
 6 whether that's part of it, then it may be that we need
 7 some different wording that simply carves the point out
 8 for later decision . But my concern is that we don't end
 9 up with wording that implies your Lordships have given
 10 an answer which has not been given .

11 It 's probably not a good idea for me to attempt to
 12 draft on my feet . I 'm content if that 's what
 13 your Lordships ' view is as to what's been decided, but
 14 I submit that we may need to have some further wording
 15 just to make it clear that that is where we are .
 16 I think I understand what your Lordships are putting to
 17 me .

18 LORD JUSTICE FLAUX: Well, you have an absolute army of
 19 potential draftsmen to hand who have heard the
 20 discussion between you and the court and who can put
 21 forward some sort of -- for example, for the avoidance
 22 of doubt, et cetera , the court has not decided . That
 23 would cover the point , I think .

24 MR SALZEDO: Yes, my Lord . Can I suggest that we perhaps
 25 circle back to 11.2(a) slightly later in the

1 proceedings --
 2 LORD JUSTICE FLAUX: Yes .
 3 MR SALZEDO: -- when we'll see if we can propose something
 4 and maybe in an ideal world even see if we can exchange
 5 it with the FCA before we do .
 6 LORD JUSTICE FLAUX: Yes, that sounds sensible, Mr Salzedo .
 7 Mr Edelman, do you want to say anything else on this
 8 point?
 9 MR EDELMAN: Well, as long as the declaration does no more
 10 than record what it is that the court has not decided,
 11 and which Mr Salzedo has admitted the court hasn't
 12 decided, then I suspect it would be unobjectionable .
 13 I will have to take instructions .
 14 LORD JUSTICE FLAUX: Yes .
 15 MR EDELMAN: But if it's no more than confirmation of what
 16 we say is the obvious and he accepts is the obvious,
 17 then that should be all right .
 18 LORD JUSTICE FLAUX: Right .
 19 MR EDELMAN: So then we move on to the trends clause, and
 20 I have well in mind what my Lord said at the outset , and
 21 I have to confess --
 22 MR TURNER: I think there may be a point on subparagraph (c)
 23 of 11.2 .
 24 MR EDELMAN: Ah right, yes, I thought that had been --
 25 MR TURNER: No, it hasn't . It's still there .

1 MR EDELMAN: Right . Perhaps I'll leave Mr Turner, if it 's
 2 Mr Turner's point, to deal with it .

3 Submissions by MR TURNER

4 MR TURNER: My Lords, just very briefly . We suggest that
 5 the word "national" should precede "COVID-19" with
 6 "outbreak" or it could be rephrased as simply "no
 7 COVID-19 in the UK" . Either of those formulations we
 8 say would accurately reflect those parts of the judgment
 9 which address what needs to be stripped out on a proper
 10 application of the counterfactual on the hybrid clauses ,
 11 which, so far as COVID-19 was concerned, was -- can I go
 12 to the judgment at paragraph 278, so that's {N/1/85} .

13 LORD JUSTICE FLAUX: The national outbreak of COVID-19?

14 MR TURNER: Precisely, and I can make the same points by
 15 reference to 279 and also in relation to RSA 1 which is
 16 another hybrid clause at paragraph 296 .

17 My Lord, all we are seeking to do is not only to
 18 reflect the terms of your judgment, but also to bring
 19 this into line with the approach you've taken on the
 20 disease clauses which is reflected in the agreed
 21 wording, if we go back, please, to {N/11/6} . So
 22 11.2(a):

23 "for disease clauses means after the date on which
 24 cover under the policy is triggered there was no
 25 COVID-19 in the UK ."

1 But the FCA's formulation requires us to strip out
 2 COVID anywhere in the world, and we say that is wrong,
 3 it's inconsistent with the agreed test on disease
 4 clauses, and it's inconsistent with your judgment . It's
 5 a short point .

6 LORD JUSTICE FLAUX: Mr Edelman?

7 Submissions in reply by MR EDELMAN

8 MR EDELMAN: I think the concern here is whether this is
 9 intended by insurers as a back door to saying that we --
 10 they can take into account in the counterfactual that,
 11 for example, foreign visitors couldn't come to stay at
 12 holiday properties as part of a counterfactual , and
 13 whether that is what lies behind the reference to
 14 "national" in this respect , which wasn't an issue that
 15 the court was focused on .

16 So that really , I think, is the concern about this ,
 17 is whether the court intended to say that: well, for the
 18 purposes of the counterfactual you can take into account
 19 the national -- you don't take into account national
 20 COVID, but you can take into account, for example,
 21 global COVID pandemic, international travellers not
 22 coming, and so on, which was not, as we understand it ,
 23 something that the court actually addressed specifically
 24 and didn't specifically exclude -- didn't exclude from
 25 your decision about the counterfactual not including

1 COVID-19.
 2 So, in other words, it should be general, no
 3 COVID-19, and not some particular part of the pandemic.
 4 LORD JUSTICE FLAUX: Well, isn't there an inconsistency in
 5 your approach here, as Mr Turner points out? Because
 6 11.2(a) says "for disease clauses means after the date
 7 on which cover under the policy triggered there was no
 8 COVID-19 in the UK", which does reflect what we said in
 9 the judgment. The issue as to what the position was
 10 internationally, and any impact that had, was not
 11 something that was actually -- so far as I can
 12 recollect, was ever addressed as part of the argument by
 13 anybody.
 14 MR EDELMAN: Well, perhaps, then, if the language used is
 15 merely to reflect the language in 11.2(a), no COVID in
 16 the UK.
 17 LORD JUSTICE FLAUX: Yes, I think that's what Mr Turner was
 18 suggesting as an alternative.
 19 MR EDELMAN: Yes.
 20 LORD JUSTICE FLAUX: All right?
 21 MR EDELMAN: All right.
 22 LORD JUSTICE FLAUX: Okay, let's move on then to trends
 23 clauses.
 24 Submissions by MR EDELMAN
 25 MR EDELMAN: 11.3 {N/11/7}. My Lords, as you have seen,

1 there is some debate as to the effect of your Lordships'
 2 judgment on this issue and you have seen that the Hiscox
 3 Action Group take the position that all pre-trigger
 4 COVID effects must be ignored in calculating the
 5 indemnity for the post trigger period. I'm going to
 6 leave Mr Lynch to make the running on that, as it's
 7 a point he has developed.
 8 My Lords dealt with the Arch/ Ecclesiastical point.
 9 We raised it only because it had been raised with the
 10 FCA as a point, not with the intention that we would
 11 pursue that positively, but the court has clarified
 12 that.
 13 And then the third point I wanted to make is this:
 14 whilst the effect of the example that the court has
 15 given at paragraph 389, {N/1/113}, the church collection
 16 point, is understood, there is an issue as to what, if
 17 anything, the court intended in relation to a business
 18 which closed on 20 or 23 March, for example, in response
 19 to a government instruction to do so in circumstances
 20 where the legislation wasn't until a few days later.
 21 The question is: can insurers with a policy only
 22 triggered by legislation say, in reliance on 389, when
 23 the policy was triggered you had already closed and
 24 there was nil income, or is the case that the closure is
 25 not a relevant trend or circumstance, or that at least

1 it's open to insurers to contend that it's not,
 2 otherwise this might be a very fatal blow to many
 3 businesses?
 4 Now, the FCA does not apprehend that the court
 5 intended its simple illustration, which was given as
 6 an example to show how the court considered the clause
 7 would operate, to govern such a situation as I've
 8 explained and reduce the indemnity to nil.
 9 Now, the FCA and Hiscox Action Group having raised
 10 the issue, what Hiscox has said is as follows, and if we
 11 can go to bundle P, tab 5, page 11, please -- my Lord
 12 probably saw this -- {P/5/11}, paragraph 35. This is
 13 referring to Mr Leedham's statement for the HAG:
 14 "If an insured has chosen to close voluntarily prior
 15 to being required to do so ... it will not be entitled
 16 to any indemnity in respect to any financial loss
 17 suffered during the period prior to the relevant
 18 Regulations coming into force. This should be
 19 uncontroversial."
 20 It is, on the Hiscox -- on my Lord's judgment on the
 21 Hiscox wording.
 22 But then (2):
 23 "Where cover exists, Hiscox is committed to
 24 adjusting policyholders' claims in accordance with
 25 normal loss adjusting principles, where appropriate

1 having regard to business trends affecting businesses
 2 before the insured peril, as permitted by the Judgment.
 3 Hiscox has not treated and will not treat a voluntary
 4 closure following the announcement of the 21 March
 5 and/or 26 March Regulations (as applicable) and before
 6 their coming into effect as representative of a trend."
 7 Now, the FCA has sought confirmation that Hiscox was
 8 treating the 20, 23 and 24 March announcements about
 9 business closures as such announcements, but any further
 10 elaboration has been refused.
 11 What --
 12 LORD JUSTICE FLAUX: I can't now recall when the 21 March
 13 regulation -- well, let's look at the 26th ones, because
 14 they're the broadest, really -- when they were first
 15 announced.
 16 MR EDELMAN: Well, there's a combination of announcements,
 17 because obviously they include the social distancing.
 18 LORD JUSTICE FLAUX: The point that Mr Gaisman is conceding
 19 here, if it is a concession as such, seems to me, at
 20 least, to be a correct one to make: that in
 21 circumstances where it has already been announced by the
 22 government that they are going to legislate, if you then
 23 close your business in anticipation of that legislation
 24 coming into effect, then it seems to me that in effect
 25 business closed as a consequence of -- or whatever the

1 wording is -- the regulations .
 2 MR EDELMAN: The only question I --
 3 LORD JUSTICE FLAUX: More difficult in the case where
 4 there's, as it were, voluntary closure some time before
 5 there's any regulation and before anybody has announced
 6 there's going to be a regulation .
 7 MR EDELMAN: My Lord, I'm not addressing that issue. I'm at
 8 the moment simply focusing on the announcement issue and
 9 whether it is being said that, in order to be
 10 a qualifying announcement, it has to contain with it
 11 a commitment to enact legislation or whether it's
 12 sufficient that there was an imperative announcement
 13 which was very swiftly followed by legislation , from
 14 which one can infer that the announcement was, in fact,
 15 a precursor to legislation .
 16 LORD JUSTICE FLAUX: Well, I think we'll have to hear what
 17 Mr Gaisman says on this point.
 18 MR EDELMAN: But in any event, what we submit, if we could
 19 go back to {N/11/7}, subject to the deletion in (d) of
 20 the reference to Arch and Ecclesiastical , our
 21 formulation is to be preferred over insurers '
 22 formulation .
 23 If we go over to {N/11/8}, there is a question
 24 whether the court can include the words from "the court
 25 did not address" onwards. So I recognise that those are

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1 of a different character to the words that go before and
 2 are intended to try and provide some clarity on this
 3 very important topic -- I don't want to underestimate
 4 its importance -- rather than -- to provide a bit of
 5 clarity and guidance to those adjusting these claims, so
 6 that --
 7 LORD JUSTICE FLAUX: Part of the difficulty, Mr Edelman, is,
 8 again, this was a point that was not really addressed by
 9 the parties in their submissions at the hearing.
 10 True it is you addressed us on the point in relation
 11 to, as it were, the issue of principle about
 12 anticipation of things happening and the example of the
 13 anticipated hurricane and so forth , and we had some
 14 submissions, I forget from whom now, from the insurers,
 15 but we did not drill down to this specific point, which
 16 of course in one sense is fact-sensitive anyway, because
 17 isn't it going to depend -- if you go back to
 18 Mr Gaisman's point at 35.2, if in any given case
 19 a particular business says: well, we actually closed our
 20 business on 24 March, but we closed it because we knew
 21 from what the government said that legislation was
 22 pending, and we wouldn't have closed the business if we
 23 hadn't thought legislation was pending.
 24 Now, that sort of evidence in any given case seems
 25 to me, at least arguably, you would not take into

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1 account as a trend the period between the 24th and the
 2 26th. But these are all fact-specific and
 3 fact-sensitive issues .
 4 MR EDELMAN: My Lord, that's why I recognised that the words
 5 from "the court did not address" onwards -- everything
 6 else before that, we say, is reflecting the judgment and
 7 I would recognise those words onwards are not, and it's
 8 merely an invitation to the court to include that in, if
 9 you feel able to do so.
 10 My Lord, the only other point that I want to make on
 11 the form of the order is that -- and this may not be --
 12 this may be an inadvertent point on the part of
 13 insurers -- is in (c) of their draft:
 14 "Any such continuation must be at the level at which
 15 it had previously occurred."
 16 And you compare that to our (e) above and you will
 17 see that we've inserted "must be at no more than".
 18 LORD JUSTICE FLAUX: We are alive to this point, Mr Edelman,
 19 because it seems to us that if -- the advantage would
 20 be, wouldn't it, of a business where one part of the
 21 insured peril is in existence . So the COVID, for
 22 example, is in existence prior to closure . There is
 23 a downturn in the business . Then there's an imposition
 24 of a government restriction which leads to an even
 25 bigger downturn. The insured is entitled to say though,

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1 isn't he, that had it not been for the downturn, our
 2 business would have picked up -- sorry, had it not been
 3 for the government restriction --
 4 MR EDELMAN: Yes.
 5 LORD JUSTICE FLAUX: -- despite COVID our business would
 6 have picked up.
 7 MR EDELMAN: Yes, exactly.
 8 LORD JUSTICE FLAUX: And I think there must be a lot of
 9 businesses which are in that position , one way or
 10 another, and your formulation of "no more than"
 11 addresses that point, doesn't it?
 12 MR EDELMAN: My Lord, what we were trying to do was to give
 13 effect to the court's example at paragraph 389, and to
 14 make it clear that it's no more than that. If it's
 15 COVID and if COVID is given a 10% reduction, it can't be
 16 more than that. But whether it is that or something
 17 less is a matter of fact .
 18 LORD JUSTICE FLAUX: Yes, I see.
 19 MR GAISMAN: My Lord, if I may just intervene, I don't think
 20 this has been communicated to my learned friend
 21 Mr Edelman, but so far as Hiscox are concerned, we are
 22 happy with the FCA's formulation on this point.
 23 MR EDELMAN: I did apprehend that this was not
 24 controversial , and so I didn't take it as being
 25 an attempt to fix it . It was just a linguistic point ,

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1 and I did assume that actually (c) was focused at trying
 2 to make the point that it was no more than, and it just
 3 needed some extra words to achieve it .
 4 My Lord, I think firstly I should remind the court
 5 that obviously we're going to need to take a break.
 6 I think the next stage is probably for Mr Lynch, if he
 7 could say whether he wants to pursue any better
 8 alternative to ours, and then for --
 9 LORD JUSTICE FLAUX: Just before you go, or we take
 10 a break -- I think you're right, we ought to take
 11 a break, we've been going for nearly an hour and a half.
 12 So where we get to on your formulation is, if
 13 I'm looking at your 11.3, Mr Edelman, so (a), (b) and
 14 (c), and then (d), the opening words, and then we drop
 15 down from the word "then" to the second formulation "it
 16 is in principle appropriate"?
 17 MR EDELMAN: Yes.
 18 LORD JUSTICE FLAUX: And then I think you accept that we
 19 ought to delete the words from "the court did not
 20 address" onwards.
 21 MR EDELMAN: Well, I leave it.
 22 LORD JUSTICE FLAUX: You don't force the point, as it were?
 23 MR EDELMAN: No, it's an invitation to include them.
 24 LORD JUSTICE FLAUX: And then (e) is in your formulation,
 25 which Mr Gaisman accepts.

1 That's very helpful because we know where we stand.
 2 Okay, well I suggest that we take a break for
 3 about -- if we take 10 minutes, is that going to be all
 4 right?
 5 MR EDELMAN: Certainly, as far as I'm concerned.
 6 LORD JUSTICE FLAUX: I mean, in a sense, this is the most
 7 significant point we have to deal with, I think.
 8 MR EDELMAN: Yes. I think it is.
 9 LORD JUSTICE FLAUX: So we're all right for time, I think.
 10 MR EDELMAN: Yes. Yes, there are some further points on
 11 Hiscox, but hopefully --
 12 LORD JUSTICE FLAUX: Oh yes, I'm not suggesting there aren't
 13 some important points but this is, as it were, the
 14 longest point.
 15 MR EDELMAN: Yes, exactly.
 16 LORD JUSTICE FLAUX: Okay, well, if I say 10 minutes, that
 17 will give everybody an opportunity to go and get a cup
 18 of coffee.
 19 MR EDELMAN: Right, thank you.
 20 LORD JUSTICE FLAUX: All right.
 21 (11.56 am)
 22 (A short break)
 23 (12.06 pm)
 24 LORD JUSTICE FLAUX: Right, if everybody is ready, is
 25 Mr Lynch next?

1 MR LYNCH: My Lord, yes, thank you.
 2 LORD JUSTICE FLAUX: Yes, Mr Lynch.
 3 MR LYNCH: My Lords, I believe everybody is ready. Nobody
 4 seemed to respond but I'll just take it for granted that
 5 they are ready.
 6 LORD JUSTICE FLAUX: Mr Gaisman is here and Mr Edelman is
 7 here.
 8 Submissions by MR LYNCH
 9 MR LYNCH: My Lord, thank you.
 10 My Lords, we've obviously heard your Lordship's very
 11 helpful introductory comments and also the discussions
 12 with Mr Edelman. If we could then please pull up
 13 {N/11/7}, your Lordships will see at 11.3(d) the point
 14 attributed to the Hiscox Action Group. Obviously that
 15 was drafted before seeing the discussions today and then
 16 also the helpful clarification by Hiscox in their
 17 paragraph 35.2.
 18 So in light of your Lordship's comments, the Hiscox
 19 Action Group will not be pursuing that wording, but
 20 instead the further wording in green a couple of pages
 21 on.
 22 But if we could first, please, go back to the
 23 helpful clarification in the Hiscox skeleton at
 24 paragraph 35.2, which is at {P/5/11}, your Lordships
 25 will have seen there the phrase:

1 "Hiscox has not treated and will not treat
 2 a voluntary closure following the announcement of the
 3 21 March and/or 26 March Regulations (as applicable) and
 4 before their coming into effect as representative of
 5 a trend."
 6 Your Lordships were also taken to the correspondence
 7 between the solicitors acting for the FCA and for Hiscox
 8 seeking to clarify the meaning of that, and the response
 9 essentially is along the lines of "Well, it means what
 10 it says".
 11 Subject to my learned friend Mr Gaisman clarifying
 12 further, the keyword appears to be "announcement". If
 13 we could please then look at {N/1/12}, and that's
 14 a reference to paragraph 40 in the judgment. And
 15 your Lordships will see there -- and this is only
 16 an example -- but your Lordships will see there:
 17 "On 23 March... the Prime Minister made
 18 an announcement which included the following."
 19 Then if we go over the page, please, to {N/1/13}, we
 20 don't need to read through all of it, but just in about
 21 the middle of the page, above the first bullet point and
 22 then just above that, this is the Prime Minister saying:
 23 "If you don't follow the rules the police will have
 24 the powers to enforce them, including through fines and
 25 dispersing gatherings."

1 So what the Hiscox Action Group understands,
2 although, of course, subject to what my learned friend
3 Mr Gaisman will go on to say, is that this is a very
4 helpful clarification of the position by Hiscox to say:
5 well, we mean exactly this. We mean that when the Prime
6 Minister said on 23 March, although it actually dates
7 back to 16 March -- that was the first full-blown
8 announcement -- and then further dates after that, that
9 restrictions were being put in place, of course it meant
10 that there were going to be actual rules. It was just
11 a matter of time before the rules came in, and those are
12 announcements and this is just one example, in the time
13 that I have had, indicating that that's exactly what
14 they were: an announcement of rules to come in.

15 For that reason, the apparent concession at
16 paragraph 35.2 makes very good sense. In substance it
17 makes good sense as well because otherwise it means,
18 obviously, an insured that closed on 23 March, rightly,
19 in response to the Prime Minister's direction, and had
20 a reduction to zero income, otherwise would then go into
21 the period of indemnity with zero income, and that would
22 count against them, whereas the reckless insured would
23 stay open and have full income recklessly.

24 LORD JUSTICE FLAUX: If we go -- it's perhaps most --
25 perhaps even clearer if you go back to paragraph 32 of

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1 the judgment. This is 20 March. In the second
2 paragraph there:
3 "... we are collectively telling ... cafés, pubs,
4 bars, restaurants to close tonight, as soon as they
5 reasonably can, and not to open tomorrow."
6 And then:
7 "... nightclubs, theatres, cinemas, gyms ... to
8 close on the same timescale".
9 Then the 23 March regulations were promulgated which
10 followed that up with the formal legislation. That's
11 the point, isn't it? That to the extent that a business
12 closed, say, at 5 o'clock on the 20th, so -- I can't
13 remember what -- this is probably about 5. So let us
14 say that the relevant pub closed immediately and not on
15 the following day, I think I would read what Mr Gaisman
16 is saying as saying that it would not be said that the
17 business was lost on the night of the 20th meant that --
18 sorry, it would not be said that it was a part of the
19 trend that the business had already closed.

20 MR LYNCH: My Lord, absolutely, and we would regard that as
21 entirely correct on the basis of the judgment, but also
22 just correct on how the policy should operate and how it
23 should operate in principle.

24 That, of course, then extends to the slightly longer
25 period between the 23rd and the 26th. That is a matter

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1 of how long it took to put into effect the legislation.
2 It doesn't affect the principle. The principle is the
3 same, which is that what is being announced is these are
4 restrictions. I see my learned friend Mr Gaisman has
5 appeared, and it may be that --

6 Submissions by MR GAISMAN

7 MR GAISMAN: I don't want to interrupt, but the qualifying
8 announcements that we have in mind, as I'm sure comes as
9 no surprise to the court, are for 21 March the
10 announcement on the 20th, and for 26 March the
11 announcement on the 23rd.

12 LORD JUSTICE FLAUX: That's what I thought, Mr Gaisman,
13 because when the Prime Minister said: we will
14 immediately close all the shops, he could say that until
15 he was blue in the face but unless he passed
16 legislation, it wouldn't have any effect.

17 MR GAISMAN: The only qualification, because my learned
18 friend rather cheekily tries to extend what I'm saying
19 right back to the 16th. I'm not saying that. I'm not
20 conceding it. That's an argument for another day, and
21 we were very surprised to see the date of the 16th
22 inserted in my learned friend's draft declarations.

23 Indeed, I will submit that it's quite unnecessary,
24 given what I have said, for there to be any declaration
25 on this at all. This wasn't the subject of debate

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1 before your Lordships, but I've said it and we will, of
2 course, stand by it.

3 LORD JUSTICE FLAUX: Yes. We don't know, or I don't know
4 yet, Mr Justice Butcher and I don't know yet, to what
5 extent other insurers accept the same point. But, as
6 you rightly say, Mr Gaisman, it wasn't the subject of
7 argument at trial, was it? I don't remember it being
8 argued, anyway.

9 MR GAISMAN: No, and what I have done is, in our skeleton
10 argument, correct the attribution to us of an argument
11 that, as far as I'm aware, having taken instructions, we
12 have never made and would not make and are not making.
13 Other insurers will take their own position. This
14 doesn't need to be the subject of a declaration but I am
15 quite happy to have stated Hiscox's position on the
16 record.

17 LORD JUSTICE FLAUX: Yes, thank you.

18 Submissions by MR LYNCH

19 MR LYNCH: My Lord, thank you. Can I express gratitude to
20 my learned friend Mr Gaisman for clarifying that
21 position. It's genuinely helpful, and I apologise if
22 I had misunderstood by putting in the 16th. Obviously
23 there was correspondence seeking to clarify what was
24 meant by paragraph 35.2 and it was met with a "It means
25 what it means".

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1 LORD JUSTICE FLAUX: I think the effect of our judgment,
 2 Mr Lynch, is that whatever the advice was on the 16th,
 3 it was advice and it wasn't in any sense mandatory or
 4 anticipatory -- anticipating something mandatory.
 5 MR LYNCH: My Lords, obviously the Hiscox Action Group would
 6 put -- perhaps if we turn up, please, the proposed
 7 wording at {N/11/8-9}.

8 Thank you very much. This is the wording which
 9 essentially follows the FCA's wording at (d), but then
 10 what it does is it takes the FCA's wording that has --
 11 the FCA's wording that starts at "For example, where
 12 a business closed", which obviously your Lordships have
 13 discussed with Mr Edelman, and then it takes that
 14 passage, that sentence or two sentences further, up
 15 until where it says "in each individual case", and it
 16 splits it out into subparagraphs (ii) and (iii).

17 The reason for doing that is, one, simply because of
 18 the importance of the point, and to clarify the point
 19 would be very helpful; but, secondly, obviously this
 20 issue, which my learned friend Mr Gaisman has very
 21 helpfully explained, is a significant point in the case
 22 and is a matter of great financial importance, not just
 23 to Hiscox policyholders but to other policyholders too.
 24 And then also, as your Lordships will have seen from
 25 Leedham 2, that will potentially have a great impact on

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1 whether this matter goes further.
 2 Not everybody will have heard Mr Gaisman's very
 3 helpful explanation. Not everybody will have read
 4 paragraph 35.2 of the Hiscox skeleton.

5 However, everybody will review the declarations, and
 6 if this is a matter that the court feels can be
 7 encapsulated in a form of wording in these declarations,
 8 that would be immensely helpful and goes to my learned
 9 friend Mr Turner's point, which is that there is a wide
 10 audience for these declarations, and if the court is
 11 prepared to go as far as including these declarations,
 12 perhaps reworded if necessary, and obviously taking
 13 account of the dates of 16th, 20th, 23rd, if the court
 14 were prepared to go further that would be of huge
 15 benefit to policyholders and then all who need to apply
 16 the terms of the declaration.

17 Hiscox does not object to the point of principle.
 18 In fact it's their proposition. No other insurer has
 19 yet objected, and of course they may, but they haven't
 20 so far.

21 If there is no objection from insurers, and if in
 22 principle your Lordships are content with the substance
 23 of these proposed declarations, then, again taking my
 24 learned friend Mr Turner's point, it would be very
 25 helpful to have it in the declarations if your Lordships

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1 are prepared to go that far, given the audience for the
 2 declarations.

3 Otherwise, the Hiscox Action Group adopts the FCA's
 4 position and has nothing to add on that and, again, is
 5 grateful to my learned friend Mr Gaisman for clarifying
 6 Hiscox's position on (e) of the FCA's position.

7 That's the Hiscox position -- Hiscox interveners'
 8 position, unless I can help further on those points.

9 LORD JUSTICE FLAUX: No, thank you very much, Mr Lynch.
 10 MR LYNCH: Thank you.

11 LORD JUSTICE FLAUX: Mr Gaisman?

12 Submissions by MR GAISMAN

13 MR GAISMAN: My learned friend mentioned the date of the
 14 16th again. I assume that was a slip of the tongue.

15 LORD JUSTICE FLAUX: Well, I've already indicated that even
 16 if we were to make the declaration that he seeks in his
 17 (ii), it would not include 16 March.

18 MR GAISMAN: Can we look at {N/11/8} where, in a fetching
 19 blue, one sees insurers' position on the declarations.
 20 (c) needs to be changed to reflect the fact that we've
 21 now come into line with the red (e) above it.

22 Now, so far as concerns the FCA's position, given
 23 that they have abandoned, as I understand it, the whole
 24 of this from "the court did not address", if we go back
 25 to the previous page --

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1 LORD JUSTICE FLAUX: Well, not abandoned it, but hasn't --
 2 MR GAISMAN: Pressed it.
 3 LORD JUSTICE FLAUX: -- pressed it.
 4 MR GAISMAN: Right.
 5 MR EDELMAN: My Lord, can I just add one qualification?
 6 I apologise sincerely for interrupting Mr Gaisman, but
 7 it's been pointed out to me that that should not have
 8 applied to the last sentence which, I think, is
 9 reflective of the judgment.

10 LORD JUSTICE FLAUX: Yes, I picked that point up because
 11 that is in Mr Lynch's draft.

12 MR EDELMAN: That was my mistake.

13 MR GAISMAN: Can we go to the next page, please, because
 14 I can't see it at the moment {N/11/8}.

15 LORD JUSTICE FLAUX: So what you are not conceding but
 16 effectively not pursuing, Mr Edelman, is the words from,
 17 in the third line, "the court did not address", down
 18 to -- down about five lines to the end "in each
 19 individual case"?

20 MR EDELMAN: Yes, correct, and that was my mistake and
 21 I apologise to Mr Gaisman and to the court.

22 LORD JUSTICE FLAUX: Right.

23 MR GAISMAN: I don't think there's a problem with that,
 24 unless I'm told that there is.

25 The main issue that now exists between the FCA and

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1 Hiscox is at the top of the page. But can we just read
 2 from the previous page in the red? The previous page,
 3 please {N/11/7}:
 4 "It is in principle appropriate for the
 5 counterfactual to take into account the continuation of
 6 that measurable downturn and/or increase ... as a trend
 7 or circumstance ... in calculating the indemnity payable
 8 in respect of the period during which the insured peril
 9 was triggered and remained [over the page please]
 10 operative, but only if the particular effect amounts to
 11 a trend or circumstance (as required under the
 12 particular clause)..."
 13 So far so good. And then these words:
 14 "... and is sufficiently distinct from the insured
 15 peril."
 16 Now, that is completely inconsistent with
 17 your Lordships' judgment, and we'll look at that if we
 18 really need to, because your Lordships remember that you
 19 gave the example of the collection going down by 20% in
 20 the case of Ecclesiastical, and you explain that the
 21 reason why that was not recoverable was the same as your
 22 reasoning in relation to Arch, and your reasoning in
 23 relation to Arch specifically dealt with what I might
 24 call the gathering storm of the insured peril.
 25 I've expressed that very compendiously, but if

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1 your Lordships would like to look at the ...
 2 LORD JUSTICE FLAUX: Well, Mr Gaisman, the example that was
 3 posed in argument was the example derived from
 4 Orient Express of the hurricane --
 5 MR GAISMAN: Yes.
 6 LORD JUSTICE FLAUX: -- where the hurricane strikes, but
 7 before the hurricane strikes, concern about the
 8 hurricane coming is such that everybody cancels their
 9 holiday in New Orleans and doesn't go there.
 10 MR GAISMAN: Yes, but it's the same --
 11 LORD JUSTICE FLAUX: What was said was: well, that can be,
 12 as it were, guarded into the overall calculation of the
 13 loss. The point was that to the extent that somebody is
 14 anticipating an insured peril which hasn't yet occurred,
 15 you can't recover in any way.
 16 I suppose one way of looking at it would be in the
 17 hurricane example, if the hurricane -- the hurricane is
 18 feared, and everybody says: well, I'm not going to go to
 19 New Orleans, but in fact the hurricane then heads off to
 20 Bermuda and doesn't come anywhere near New Orleans,
 21 there's never an insured loss.
 22 MR GAISMAN: No, but what your Lordships were saying is if
 23 it does strike New Orleans, then there is no recovery in
 24 respect of the diminution before the occurrence of all
 25 the elements of the composite peril.

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1 LORD JUSTICE FLAUX: Precisely.
 2 MR GAISMAN: If your Lordships need more help on it I will
 3 show your Lordships the relevant paragraphs of the
 4 judgment.
 5 LORD JUSTICE FLAUX: I don't think you need to help us on
 6 that, Mr Gaisman, because we're well aware of them.
 7 MR GAISMAN: No, no, but what I mean by that is I don't know
 8 whether I need to address your Lordships any further on
 9 the unacceptability in the FCA's declaration of the
 10 words "and is sufficiently distinct from the insured
 11 peril", because that is the opposite of what
 12 your Lordships said.
 13 MR JUSTICE BUTCHER: What I need help on, Mr Gaisman, is
 14 this: your paragraph 35.2, I think it is.
 15 MR GAISMAN: Yes.
 16 MR JUSTICE BUTCHER: You're going to say this is a slightly
 17 different point.
 18 MR GAISMAN: Yes.
 19 MR JUSTICE BUTCHER: But what I need help on is whether that
 20 concession or acceptance or non-argument of that point
 21 is adequately reflected in insurers' position B. If
 22 that concession is giving effect to our judgment, how is
 23 it reflected in the declarations which you suggest?
 24 MR GAISMAN: My Lords, it isn't giving effect to
 25 your Lordships' judgment. It is something that has

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1 happened since the judgment, and that is one of the
 2 reasons why I say it doesn't belong in a series of
 3 declarations which are intended to give effect to
 4 your Lordships' judgment.
 5 Whether or not it's a concession or whether it might
 6 be argued that it is a logical corollary of what
 7 your Lordships have said doesn't matter. Hiscox have
 8 taken this position from a loss adjusting point of view
 9 and for other reasons. Because they are content to say
 10 what they have said, they haven't examined what the
 11 legal basis of it is.
 12 That's their position. It may not have a legal
 13 basis in your Lordships' judgment, it may be the
 14 consequence of orthodox loss-adjusting principles, or it
 15 may just be common sense. Who knows.
 16 But your Lordship has undoubtedly, if I may say so,
 17 raised a separate point, and I would like, if I may,
 18 eccentric as it is, to ignore your Lordship's
 19 interruption for a moment.
 20 What I'm dealing with -- there are only these two
 21 points, I think.
 22 LORD JUSTICE FLAUX: Yes.
 23 MR GAISMAN: But clearly the words "and is sufficiently
 24 distinct from the insured peril" are a hangover of my
 25 learned friend Mr Edelman's arguments that trends

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1 clauses only dealt with, could only deal with,
 2 extraneous matters like the ubiquitous though currently
 3 rather difficult to find Michelin starred chef.
 4 Now, it's quite obvious from the paragraphs that
 5 I will take your Lordships to if necessary that
 6 your Lordships rejected that argument because, although
 7 in paragraph 389 you talk about the 20% diminution in
 8 the collection without their expressly saying that it's
 9 due to COVID, you cross refer to the same paragraphs,
 10 the Arch paragraphs, 349 to 351, where the example
 11 expressly is, because that was Mr Edelman's argument and
 12 your Lordships there reject it.
 13 So it can't be right to have the words "and is
 14 sufficiently distinct from the insured peril" because
 15 that completely undermines the essential position which
 16 is that until -- I've taken this shortly, but the logic
 17 of your Lordships' judgment is that -- and this is the
 18 point on which we lost -- once you got all three
 19 matching elements present, then to that extent the
 20 insurers had to, as it were, bear all the consequences
 21 of those. The corollary is, until you do, the fact that
 22 you've got one, in a composite peril which requires
 23 three, is, in a sense -- well, in the relevant sense,
 24 legally irrelevant.
 25 Therefore to require something distinct effectively

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1 treats one element of the insured peril on its own as
 2 an inadmissible trend, and that can't be right. That is
 3 inconsistent with your Lordships' judgment.
 4 Now, that's all -- however off my saying that, it's
 5 either right or wrong. So can I come back to my --
 6 LORD JUSTICE FLAUX: It's paragraph 351, isn't it? It's the
 7 last sentence of 351 which makes this absolutely clear.
 8 MR GAISMAN: Well, actually, my Lord, to be honest, if I had
 9 limitless time I would take your Lordships carefully
 10 through 349 and in particular 350.
 11 LORD JUSTICE FLAUX: Yes, I see that. I see that.
 12 MR GAISMAN: Because this is the very argument that was
 13 under consideration.
 14 LORD JUSTICE FLAUX: Yes.
 15 MR GAISMAN: But yes, the conclusion is in 351 and it's
 16 reached as a matter of principle and on the trends
 17 clauses, Hiscox's trends clauses by the way being
 18 indistinguishable in this respect from Arch's.
 19 So that point, really, should not be in the draft
 20 declaration. So one simply comes back to the fact
 21 that -- my Lord Mr Justice Butcher's point. I've
 22 expressed Hiscox's position and these declarations are
 23 general declarations, and I'm not speaking for the rest
 24 of the market or for my fellow defendants. That is our
 25 position.

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1 My learned friends say, without explaining why, that
 2 more people will read the declarations than the
 3 policyholders will be aware of a formal statement of
 4 Hiscox's position on the record. I rather doubt that.
 5 LORD JUSTICE FLAUX: Well, your very fair -- I mean, I'll
 6 describe it as a concession. Whether it's a concession
 7 doesn't really matter, but your position in paragraph
 8 35.2 of your skeleton argument, as elaborated in your
 9 oral submissions, will no doubt feature publicly.
 10 MR GAISMAN: Yes.
 11 LORD JUSTICE FLAUX: So that Hiscox policyholders will know
 12 where they stand in relation to Hiscox policies.
 13 MR GAISMAN: Yes.
 14 LORD JUSTICE FLAUX: Other insurers may or may not adopt the
 15 same approach.
 16 MR GAISMAN: Yes.
 17 LORD JUSTICE FLAUX: Can we just go back to your, as you
 18 described it, fetching blue text?
 19 MR GAISMAN: Yes, it is quite fetching.
 20 LORD JUSTICE FLAUX: And may I say how helpful it was to
 21 have it all in different colours, rather than crossed
 22 out, which the first draft was.
 23 Anyway, there we are. It seemed to us when we were
 24 looking at this wording in (b), Mr Gaisman --
 25 MR GAISMAN: Yes.

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1 LORD JUSTICE FLAUX: -- that if we were to adopt this
 2 wording it would be sensible to insert, after the words
 3 "it is in principle appropriate" in the second line in
 4 brackets "(subject to (a) above)" --
 5 MR GAISMAN: Yes.
 6 LORD JUSTICE FLAUX: -- just to clarify that it is
 7 a question of fact in every case.
 8 MR GAISMAN: Yes.
 9 LORD JUSTICE FLAUX: And I imagine that's not objectionable.
 10 MR GAISMAN: That is not objectionable and your Lordships
 11 have the fact that (c) is in a different form.
 12 LORD JUSTICE FLAUX: Yes, well, we've got that point as
 13 well, yes.
 14 MR GAISMAN: I don't think there's anything else I need to
 15 trouble your Lordships on on this point, unless you have
 16 any questions.
 17 LORD JUSTICE FLAUX: I don't have anything more. Does
 18 Mr Justice Butcher have anything? No.
 19 Right. Do any of the other insurers want to address
 20 the court in relation to Mr Gaisman's paragraph 35.2 of
 21 his skeleton and whether it should be put into -- in
 22 some way encapsulated in the declarations even if it's
 23 only in relation to Hiscox?
 24 Submissions by MR KEALEY
 25 MR KEALEY: My Lord, this is Gavin Kealey.

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1 LORD JUSTICE FLAUX: Yes, Mr Kealey.
 2 MR KEALEY: Hiscox has made a concession or an acceptance.
 3 We haven't considered this. It may or may not be
 4 correct. It may or may not be the fair and appropriate
 5 thing to be done. That is a matter for my client,
 6 MS Amlin, to consider in due course. It is a question
 7 of fact in any case and it certainly was not something
 8 which your Lordships decided in this case and therefore
 9 should not, positively not, be embodied in any
 10 declaration.
 11 My understanding of declarations is that they are
 12 orders that are reflective directly from what
 13 your Lordships have decided in a judgment.
 14 Your Lordships have not decided this in your Lordships'
 15 judgment and therefore that is an end of the matter.
 16 Now, as I say, that is the legal position and that's
 17 the position I take. Whether my client, MS Amlin, looks
 18 at it further in due course, as no doubt it will, it
 19 will take the right decision at the right time, taking
 20 the right advice.
 21 That's all I need to say about it, my Lord.
 22 MR TURNER: My Lord, RSA takes the same position as
 23 Mr Kealey.
 24 LORD JUSTICE FLAUX: Yes, okay. Who else is there?
 25 MR LOCKEY: My Lord, can you hear me for Arch, John Lockey?

1 LORD JUSTICE FLAUX: Yes, Mr Lockey, hello.
 2 Submissions by MR LOCKEY
 3 MR LOCKEY: Yes, we obviously repeat and adopt what
 4 Mr Gaisman said about the unsatisfactory nature of the
 5 additional words "sufficiently distinct from the insured
 6 peril".
 7 So far as Mr Gaisman's concession or 35.2 is
 8 concerned, that does not affect Arch and doesn't reflect
 9 an issue that arises on the Arch wording, which you will
 10 recall refers to advice as well as government order, and
 11 on that basis alone the additional declaration suggested
 12 by Mr Lynch is wholly inapposite to the position of
 13 Arch.
 14 LORD JUSTICE FLAUX: Right, thank you very much, Mr Lockey.
 15 Does anybody else want to say anything?
 16 No. Very well. Mr Edelman?
 17 Submissions in reply by MR EDELMAN
 18 MR EDELMAN: My Lord, just going back to the form of the
 19 declaration at {N/11/7}, as I understand it, our
 20 additional language at (a) is not objected to, so we
 21 submit that should be included.
 22 (b) of our text essentially, save that we
 23 cross-referred to (e), is the same as insurers' (a), and
 24 we submit that the cross-reference to (e) is appropriate
 25 and doesn't seem to be controversial, so that should be

1 adopted.
 2 We've also got (c), on which I understand Mr Gaisman
 3 has expressed no objection, and he also didn't object to
 4 the last sentence of (d), which I highlighted, going on
 5 to the next page, on to {N/11/8}, that last sentence.
 6 So that, we submit, should be included, and it is
 7 uncontroversial and consistent with, we would submit,
 8 consistent with the judgment.
 9 So, as I understand it, the only controversial
 10 element of our draft, subject to the part that we've
 11 already discussed from "the court did not address"
 12 onwards, is the words "is sufficiently distinct from the
 13 insured peril".
 14 Can I just correct one matter as a matter of record,
 15 just to record again, and I am afraid it will be
 16 a ground of appeal, that our submission in relation to
 17 the hurricane loss, the hurricane example, was simply
 18 that cancellations of bookings prior to the arrival of
 19 the hurricane in anticipation of it would not be a trend
 20 or circumstance to depress the reference point of income
 21 for the period of indemnity which starts with the
 22 insured damage, and that was the essence of our
 23 submission.
 24 LORD JUSTICE FLAUX: We understood what your submission was,
 25 Mr Edelman. Although you accuse us of not understanding

1 it in your skeleton, we did understand it.
 2 MR EDELMAN: Yes. Well, it was suggested that that was
 3 a way of recovering pre-hurricane loss, which it wasn't.
 4 But anyway, let's not debate that.
 5 It is relevant in this respect: when we're talking
 6 about "is sufficiently distinct from the insured peril",
 7 all we were trying to get at was the sort of point that
 8 the Hiscox Action Group have elaborated on where you
 9 have something that is actually -- somebody closes
 10 because the government makes an announcement which
 11 carries with it the imminent prospect of legislation,
 12 and that legislation does occur imminently.
 13 So that, we would submit, is not sufficiently
 14 distinct from the insured peril. I wasn't intending to
 15 go -- we weren't intending with those words to go behind
 16 the judgment. If we're not content with it, we will
 17 appeal it, but that was not the intention of those
 18 words. It was merely to encapsulate the same sort of
 19 thing that the Hiscox Action Group have raised and which
 20 Mr Gaisman has conceded. And whether the court includes
 21 those words or not is --
 22 MR JUSTICE BUTCHER: The trouble with those words is that
 23 they are capable, at least, of having a wider meaning or
 24 a wider application than that narrow circumstance, as,
 25 indeed, this debate has shown.

1 MR EDELMAN: It may be, then, if your Lordships are prepared
 2 to make any declaration at all, it has to be something
 3 specific or not at all, and that's all I wanted to say.
 4 MR GAISMAN: My Lords, just before your Lordships retire, if
 5 your Lordships need to do so, I put forward the blue
 6 wording, and we're not really very happy with 11.3(c) in
 7 red on the previous page because that appears, at least
 8 in part, to raise the possibility of recovering outside
 9 the period of the insured peril for individual elements
 10 of it:
 11 "Unless the policy wording so requires, loss is not
 12 limited by the inclusion of any part of the insured
 13 peril in the assessment of what the position would have
 14 been if the insured peril had not occurred."
 15 Now, my learned friend doesn't explain which
 16 paragraph of the judgment that's intended to reflect,
 17 and it seems to us to be rather contrary to the fact
 18 that you need to have -- the fortuity, as it's put in
 19 paragraph 287, is against all three of these elements
 20 together. We submit that's capable of misleading third
 21 parties, and --
 22 LORD JUSTICE FLAUX: Do you have any difficulty, Mr Gaisman,
 23 with the FCA subparagraph (a)?
 24 MR GAISMAN: No.
 25 LORD JUSTICE FLAUX: Or with the last sentence of their (d),

1 so that the downturn will only apply?
 2 MR GAISMAN: No.
 3 LORD JUSTICE FLAUX: Yes, okay.
 4 MR GAISMAN: Thank you very much.
 5 LORD JUSTICE FLAUX: Well, unless anybody else wants to say
 6 anything, we will go to our --
 7 Submissions in reply by MR LYNCH
 8 MR LYNCH: My Lord, yes. Sorry to -- yes, please, just some
 9 very brief points in reply, please.
 10 LORD JUSTICE FLAUX: Yes.
 11 MR LYNCH: Very briefly, I take my learned friend
 12 Mr Lockett's point absolutely. If the proposed wording
 13 is only appropriate for Hiscox, it's only appropriate
 14 for Hiscox.
 15 The only point I would make is that not all Hiscox
 16 policyholders are watching. Not all Hiscox
 17 policyholders are legally represented. There is a wide
 18 audience for this case and the obvious way to
 19 encapsulate a point with which Hiscox itself is content
 20 is in a form of wording in the declarations that makes
 21 it clear it's not a declaration on the judgment, it's
 22 a point that Hiscox is content with, and that is
 23 a simple way --
 24 LORD JUSTICE FLAUX: I think there's some force in
 25 Mr Kealey's point, that unless it actually -- the point

1 of the declarations is to reflect what we have decided
 2 in the judgment. It's not to deal with points which
 3 have arisen after the judgment in consequence of it.
 4 In one sense this is just such a point because this
 5 was never argued, Mr Lynch, either by Mr Edelman or by
 6 you. Mr Edelman's argument was the much broader one,
 7 right or wrong, that we've just been debating with him.
 8 But the point about businesses that close in
 9 anticipation of the government saying what we're going
 10 to do is introduce legislation -- I paraphrase -- that
 11 was never addressed.
 12 Now, Mr Gaisman on behalf of Hiscox has indicated
 13 what their position is. He has made a public statement
 14 in open court. I've no doubt the FCA, if it wishes to,
 15 will record that on its website, and I have no doubt
 16 that your client will also publicise it if they wish to.
 17 What the position is of other Hiscox policyholders
 18 we can't really legislate for in declarations which do
 19 not go beyond our judgment.
 20 Obviously when we retire in a moment we will discuss
 21 whether we should make a declaration in relation to
 22 Hiscox or not but it doesn't reflect the judgment as
 23 such.
 24 MR LYNCH: My Lord, absolutely. I'm grateful to
 25 your Lordship and those are absolutely accepted, all of

1 your Lordships' comments. It's simple a pragmatic way
 2 forward, that's all I would suggest. It's a pragmatic
 3 way of making clear to the public what this point is,
 4 but that's the only reason. My Lord, thank you.
 5 LORD JUSTICE FLAUX: Okay, well, we'll retire to our other
 6 parallel Skype.
 7 (12.44 pm)
 8 (Pause)
 9 (12.48 pm)
 10 LORD JUSTICE FLAUX: Right, if everybody is there -- I see
 11 Mr Edelman, Mr Lynch and Mr Gaisman, who are most
 12 concerned with this. Maybe Mr Justice Butcher isn't
 13 quite here yet.
 14 You are still on hold. No, he is here now. Good.
 15 Ruling
 16 LORD JUSTICE FLAUX: Right, we have considered carefully the
 17 various submissions by the FCA, the Hiscox Action Group
 18 and Mr Gaisman on behalf of Hiscox. What we propose in
 19 terms of the declaration in paragraph 11.3 will be as
 20 follows:
 21 Subparagraph (a) will be as per the FCA's paragraph
 22 (a) in red.
 23 Subparagraph (b) will be as per the insurers' --
 24 what is paragraph (a), but it now becomes paragraph (b),
 25 in blue.

1 Subparagraph (c) will be what was the insurers '
 2 subparagraph (b) but now becomes (c) in blue, but with
 3 the addition, after the words "in principle
 4 appropriate", of "(subject to (b) above)", and with the
 5 addition at the end of that subparagraph of the words
 6 from Mr Edelman's draft:
 7 "Further, the downturn will only apply to the extent
 8 that as a matter of fact the downturn would have
 9 continued during the indemnity period absent the insured
 10 peril."
 11 Then subparagraph (d) will be, well, in effect,
 12 Mr Edelman's subparagraph (e) in red, so including the
 13 words "no more than" before the words "the level".
 14 I hope that is tolerably clear in terms of drafting.
 15 If anybody has any queries, it can be raised before we
 16 finalise the final form of order.
 17 Right, Mr Edelman, we've got 10 minutes before
 18 lunch.
 19 MR EDELMAN: Yes, definitely time to deal with at least the
 20 first one, which is QBE 2-3. It's paragraph 12.2 on
 21 page 10 {N/11/10}, and this is the addition of the words
 22 "within and/or outside".
 23 This is an attempt by QBE to add words based on
 24 paragraph 231 of the judgment. This is at {N/1/74}.
 25 It's in the last eight or so lines of paragraph 231:

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1 "Given the reference to 'events', and taken with the
 2 nature of the other matters referred to ... the emphasis
 3 in (c) appears to us in this clause not to be on the
 4 fact that the disease occurred within 25 miles, but on
 5 the particular occurrences of the disease within the 25
 6 miles. It is the 'event' which is constituted by the
 7 occurrence(s) of the disease within the 25 mile radius
 8 which must have caused the business interruption or
 9 interference. If there were occurrences of the disease
 10 at different times and/or places, then these would not
 11 constitute the same 'event', and the clause provides no
 12 cover for interruption or interference with the business
 13 caused by such distinct 'events'.
 14 The decision, we submit, of the court, was simply
 15 that the disease must have occurred within the 25 miles
 16 and that local outbreak of the disease must have caused
 17 the interruption or interference. That is why, going
 18 back to the draft declarations at {N/11/10}, we drafted
 19 the declaration as we did: but that any other occurrence
 20 of COVID outside the area continued. So that is the
 21 counterfactual.
 22 The last sentence was in general terms, and to
 23 emphasise the point the court was making, the last
 24 sentence of paragraph 231. Again, perhaps we ought to
 25 go back so my Lords can see it again, {N/1/74}, the last

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1 sentence I read:
 2 "If there were occurrences ... at different times
 3 [and] different places ..."
 4 We read that as the court emphasising its point. It
 5 didn't seek to subdivide what had happened in any
 6 particular area on this outbreak of COVID-19 into
 7 separate events, and we submit that QBE's alteration
 8 reads too much into the judgment.
 9 The point the court was focusing on, contrasting QBE
 10 2 and 3 with other policies, is, we submit, sufficiently
 11 reflected in our draft without QBE's additional words,
 12 and those are my submissions.
 13 LORD JUSTICE FLAUX: Thank you, Mr Edelman. Now, is
 14 Ms Ansell dealing with this?
 15 MS ANSELL: Yes, I am.
 16 LORD JUSTICE FLAUX: Yes.
 17 Submissions by MS ANSELL
 18 MS ANSELL: Sorry, can you see me now?
 19 LORD JUSTICE FLAUX: Yes.
 20 MS ANSELL: Thank you.
 21 My learned friend Mr Edelman is wrong to say that we
 22 only refer to paragraph 231 of the judgment. He took
 23 you to that bit and we do say that it's significant,
 24 what you said about the event in that paragraph. But we
 25 also rely on paragraph 234, which you will find at

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1 {N/1/75}, when you in terms, at the end of that
 2 paragraph, say:
 3 "However, as we have said, the terms of Clause 3.2.4
 4 show that there is cover only if there is business
 5 interruption as a result of the 'event' of the person(s)
 6 sustaining that illness within the area. It is
 7 difficult to see how there could be such consequential
 8 interference if the disease was asymptomatic and
 9 undiagnosed."
 10 So we say that you recognised that there could be
 11 disease within the area but which was not having and not
 12 part of the event because it was not causing any
 13 particular interference.
 14 We then also rely on paragraph 235, and your final
 15 words in that paragraph, where we start:
 16 "... we consider that insureds would only be able to
 17 recover if they could show that the case(s) within the
 18 radius, as opposed to anywhere else, were the cause of
 19 the business interruption. In the context of this
 20 clause, it does not appear to us that the causation
 21 requirement could be satisfied on the basis that the
 22 cases within the area were to be regarded as part of the
 23 same cause as that causing the measures elsewhere, or as
 24 one of many independent causes each of which was
 25 an effective cause, because this clause, in our view,

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1 limits cover only to the consequences of [the] specific
 2 events."
 3 And we say that's a specific event of COVID-19
 4 within the relevant policy area.
 5 And you made a similar comment, we say, in respect
 6 of QBE 3, which we find at 237, and is still on page 75
 7 [N/1/76]:
 8 "On these bases we consider this clause too is
 9 [confirming] cover to the consequences of [the] certain
 10 happenings, in particular specific occurrences of the
 11 disease within the radius, as opposed to other
 12 happenings or events, including instances of people
 13 contracting the disease outside the radius."
 14 So you will have seen from what my learned friend
 15 said, it's common ground that the counterfactual retains
 16 all cases of COVID-19 outside of the relevant policy
 17 area. The dispute is about the cases within the
 18 relevant policy area, and we say there's no proper basis
 19 to take out -- as we read your judgment, to take out
 20 these cases because they could be asymptomatic,
 21 undiagnosed, which are not causing any specific
 22 interference or interruption to the insureds' business.
 23 The cover is for the event, ie we say the particular
 24 case or outbreak of cases, which leads to the particular
 25 interference. So, for example, you might have

1 an outbreak at a local factory or a local farm. That is
 2 what should be stripped out and not the, if you like,
 3 undiagnosed, asymptomatic, or the non-event COVID-19.
 4 We say what you shouldn't be doing -- or we believe
 5 the effect of your judgment is you don't assume there's
 6 no COVID-19 at all, and that what you end up with is
 7 a COVID-19-free area, and we say you just take out the
 8 event.
 9 We say that's consistent with the latter part of the
 10 declaration, which you see has been agreed, that you
 11 only get cover for losses which would not have been
 12 suffered had the particular occurrence or occurrences of
 13 COVID-19 which triggered cover under the policy not
 14 occurred. So, if you like, other things that were
 15 continuing on in any events, other effects.
 16 That's why we say you do need to include, or we say
 17 it's proper reflection of your judgment that we have
 18 "within and outside" within that declaration.
 19 LORD JUSTICE FLAUX: Thank you.
 20 Mr Edelman, any reply?
 21 Submissions in reply by MR EDELMAN
 22 MR EDELMAN: My Lords, there's nothing in the draft
 23 declaration the draft words that QBE seek to insert at
 24 {N/11/10} which restricts it to asymptomatic or
 25 undiagnosed cases; it's perfectly general, and what they

1 appear to be positing is that even for cases within the
 2 area, each one, the outbreak of COVID within the area
 3 can be subdivided into each individual competing cause,
 4 so that you have a separate event for each person who
 5 has COVID. This appears to be the import of the
 6 language they want to put in.
 7 It's nothing to do with symptomatic or asymptomatic
 8 or diagnosed or undiagnosed; it's perfectly general. So
 9 if you can show that there are outbreaks at two farms,
 10 then you can say -- this appears to be an attempt to
 11 say: there were occurrences at each of the farms and you
 12 can't prove that either of them was causative, for
 13 example, of a local lockdown. Let's say in due course
 14 there is a local lockdown; it will be said, in reliance
 15 on these words, no doubt, that you have to put all other
 16 local outbreaks in the pot.
 17 Now that, we submit, is not what my Lords decided at
 18 all. All you've decided, and what the declaration
 19 reflects, is the comparison you made between COVID
 20 within the area and COVID without, and that's what the
 21 declaration should be restricted to, and that's the sum
 22 total of it.
 23 And there wasn't this argument that QBE now seek to
 24 put forward through this draft declaration of carving up
 25 a COVID outbreak into its separate individuals who had

1 it.
 2 LORD JUSTICE FLAUX: Right. Does Mr Edey want to say
 3 something?
 4 Submissions by MR EDEY
 5 MR EDEY: My Lord only to support and endorse what the FCA
 6 have said. We do object to the inclusion of the words
 7 "within", and/or -- my Lords will recall that there was
 8 in fact no argument whatsoever at any point directed by
 9 any party to the question of whether one could
 10 differentiate between cases within the relevant area.
 11 The argument was solely ever about whether it mattered
 12 whether they needed to be within or without and the
 13 causal link between one versus the other. Nobody ever
 14 said anything about differentiating between cases
 15 within, and the risk is exactly as Mr Edelman says, that
 16 what is being set up here is an attempt to make it
 17 impossible, even in the case of a local lockdown --
 18 which from recollection QBE accepted would be
 19 potentially covered -- that insureds will battle away
 20 because it will be said: ah, but which cases within the
 21 area are the cause of the local lockdown?
 22 So, my Lord, we do say that those words, which were
 23 never argued about, never discussed and don't appear in
 24 your judgment, should not form part of the declarations.
 25 LORD JUSTICE FLAUX: Thank you very much, Mr Edey.

1 We'll retire to consider this and give our ruling on
 2 it now, and then we'll break for lunch.
 3 (1.02 pm)
 4 (Pause)
 5 (1.04 pm)
 6 LORD JUSTICE FLAUX: Right, Mr Justice Butcher will give our
 7 ruling on this one.
 8 Ruling
 9 MR JUSTICE BUTCHER: In relation to paragraph 12.2 we have
 10 considered the submissions which were made by the FCA,
 11 by HIGA and by QBE. We see the force of Mr Edey's and
 12 Mr Edelman's points that there was not any significant
 13 debate about other cases within the area.
 14 The declaration, as it stands, without the words
 15 added, allows for the possibility that there may be
 16 multiple occurrences of COVID-19 which have triggered
 17 the policy under the cover, and thus multiple cases can
 18 have constituted the relevant event, if that is the case
 19 factually, and we do not therefore think it is necessary
 20 to add, or appropriate to add, the words in blue in that
 21 declaration.
 22 MR EDELMAN: Thank you, my Lord, I'm grateful, and
 23 I anticipate you now wanted to break for lunch?
 24 LORD JUSTICE FLAUX: Yes, I think so, Mr Edelman. Let's say
 25 2 o'clock and then we'll proceed with paragraph 13.

1 MR EDELMAN: I'm grateful.
 2 LORD JUSTICE FLAUX: We don't have any danger of running
 3 over, do we?
 4 MR EDELMAN: All we've got now is, because everything else
 5 has fallen away, we've just got some points on Hiscox.
 6 Amlin and Zurich wording issues are all resolved. So
 7 there are some issues on that. We've just got that.
 8 Hopefully the certificates will be short, and then after
 9 that there may be some detailed argument about QIC, but
 10 I would have thought we should have time for that.
 11 MR EDEY: My Lord, just if it helps on certificates, I will
 12 be very short in light of the indication given earlier,
 13 so I don't think that will take up a great deal of time.
 14 LORD JUSTICE FLAUX: Let's break now for lunch and start
 15 again at 2 o'clock.
 16 (1.06 pm)
 17 (The short adjournment)
 18 (1.59 pm)
 19 LORD JUSTICE FLAUX: Right, when you are ready, Mr Edelman.
 20 Submissions by MR EDELMAN
 21 MR EDELMAN: I'm grateful, my Lord.
 22 Continuing with the declarations, if we could
 23 perhaps go to {N/11/10}, and you'll see that there was
 24 some suggested additional wording by Hiscox Action
 25 Group. As I understand it from Mr Lynch, they no longer

1 pursue that alternative wording, so that 13 can stand as
 2 it is.
 3 Can I just mention now, before I forget, because
 4 otherwise I'm bound to, whether my Lords would be
 5 agreeable to the sealed order being published on the FCA
 6 website as soon as it's available?
 7 LORD JUSTICE FLAUX: Well, I don't see why not. I don't
 8 know if my Lord has any views.
 9 MR EDELMAN: I'm grateful.
 10 Can I then move on to the Hiscox declarations, and
 11 the issues and declarations start at {N/11/13} of the
 12 document we have on the screen. My Lord, there are
 13 a number of issues and I'm in my Lord's hands as to
 14 whether it's easier to take them compendiously or one by
 15 one.
 16 LORD JUSTICE FLAUX: It's probably better to take them
 17 compendiously, Mr Edelman.
 18 MR EDELMAN: That was my thought. Then we all have one go
 19 at speaking.
 20 LORD JUSTICE FLAUX: Yes.
 21 MR EDELMAN: The first issue is -- it applies to 17.2 and
 22 18.3. 17.2 you've got up on screen. It's the same
 23 point: it's whether you made a decision on interruption
 24 or whether your decision should be applied to Hiscox 2
 25 and 3 as well as 1 and 4. There was an issue for the

1 court to decide on each of those policies, and that was
 2 squarely before the court.
 3 We say what the court did was to give an answer to
 4 the interruption issue by reference primarily to the
 5 Hiscox 1 lead wording, and that decision ought to be
 6 applied in the declarations to 2 and 3, as well as 4,
 7 which also merited an honourable mention in dispatches.
 8 If I can start with {N/1/76}, paragraph 243.
 9 LORD JUSTICE FLAUX: Yes.
 10 MR EDELMAN: That is where you began to deal with the
 11 policies, and you will see you are addressing here the
 12 Hiscox 1-4 policies, so you're addressing all of them,
 13 and your conclusion on the interruption issue is at
 14 {N/1/84}, paragraph 274.
 15 I think the origin of Hiscox's attempt to limit the
 16 declarations is at the foot of the page. Having
 17 expressed your general reasons you say:
 18 "As we set out below, it seems to us clear from
 19 a number of those clauses, at least in the Hiscox 1 lead
 20 wording, that 'interruption' in this wording is intended
 21 to mean 'business interruption' generally ..."
 22 LORD JUSTICE FLAUX: Mm.
 23 MR EDELMAN: Then you return to the subject in relation to
 24 the Hiscox NDDA clause at {N/1/113}, paragraph 390.
 25 LORD JUSTICE FLAUX: Yes.

1 MR EDELMAN: And that was a clause that appeared in Hiscox
2 1, 2 and 4, and your consideration of the interruption
3 issue was at page 118, starting at 118.

4 You seem to start the reasoning at 409, and then at
5 411, at the foot of the page, you refer to a number of
6 clauses, and they include loss of attraction provision,
7 specified customers and specified suppliers, and that
8 continues over the page at 413 {N/1/119}. And
9 importantly in this regard one of the clauses you refer
10 to, 413, is the unspecified customers and unspecified
11 suppliers provision, and in particular the words "of any
12 [one] of your direct customers", and then you go on to
13 discuss the difficulty with Mr Gaisman's submissions
14 about that, and he was suggesting it would be relevant
15 if there was only one customer that the business had.

16 LORD JUSTICE FLAUX: Yes.

17 MR EDELMAN: Effectively you rejected that submission.

18 Now, the same clause as you are considering in 413
19 also appeared in Hiscox 2 and 3. Perhaps I can show you
20 that, {B/7/25}, and it's item 3. This is in Hiscox 2,
21 and it's "damage at the premises of one of your
22 suppliers", and the same point about interruption
23 applies in relation to that clause there. I accept, not
24 as many clauses to indicate the same point as in Hiscox
25 1, but there is at least this one which is in common,

1 which of itself, we submit, is sufficient to demonstrate
2 the -- to support the conclusion and make the conclusion
3 you reached applicable to this policy as well, and the
4 same is true of Hiscox 3, {B/8/29}.

5 LORD JUSTICE FLAUX: Yes.

6 MR EDELMAN: If we could have that up on the screen, please,
7 {B/8/29}. There we are, and "suppliers" at the foot of
8 the page, and it's essentially the same clause.

9 As we say, the purpose of the test case was to
10 provide certainty, not uncertainty, and we invite the
11 court to go back now to {N/11/13}, to adopt our wording
12 in red, and not to restrict it, as Hiscox would, to 2
13 and 3.

14 Now, it's right, and I can't dispute this, that your
15 judgment does not explicitly address 2 and 3, but our
16 understanding is that the court was addressing this
17 issue by reference to the lead policy in Hiscox. We
18 don't accept that there was any slip or omission from
19 the judgment, but if there was, if this was not
20 implicitly dealt with, even if not explicitly dealt
21 with, then it was an obvious omission and the court can
22 fill it and ought to by this declaration.

23 And then you will see that also applies to 18.3 on
24 {N/11/16}. It's the same point, just in relation to the
25 NDDA clauses. So nothing to add on that.

1 That's the first point on Hiscox.

2 The second, going back to {N/11/14} of this
3 document, is as to the status of regulation 6, and
4 you'll see our red insertions in the draft and the
5 alternative, which is essentially to relegate 6 to being
6 capable of being a restriction imposed.

7 What you said in your judgment at {N/1/83},
8 paragraph 267, was as follows:

9 "What this means for present purposes is that the
10 only relevant matters which constituted 'restrictions
11 imposed' are those which were promulgated by statutory
12 instrument ..."

13 And then you say:

14 "... and in particular ..."

15 Now, it's right that you did not mention regulation
16 6, but all you were doing is identifying the ones
17 which -- we submit you were identifying the ones which
18 you regarded as the most significant, and not explicitly
19 excluding or relegating regulation 6. Therefore when
20 one goes on to 269, you addressed, and this was
21 obviously relevant to regulation 6:

22 "We were not, however, persuaded by Hiscox's
23 submission that the 'restrictions imposed' contemplated
24 by the 'public authority' clause necessarily had to be
25 directed to the insured, or to the insured's use of the

1 premises ..."

2 And then at 270 you say:

3 "We did not consider that it could be said that
4 Regulation 6 of the 26 March Regulations amounted to
5 a 'restriction imposed' which could have led to
6 an 'inability to use' the premises of all insureds where
7 that insured's business had relied on the physical
8 presence of customers."

9 What you were doing, you weren't saying anything, we
10 submit, about the status of regulation 6 as being
11 capable of imposing a restriction, but simply as to
12 whether it could result in an inability to use.

13 So going back to the declaration at 17.4 on
14 {N/11/14}, given that that declaration is only
15 addressing restrictions imposed and is not addressing
16 inability to use, we say that regulation 6 ought to have
17 the status which we have accorded it in the declaration.

18 LORD JUSTICE FLAUX: Isn't it implicit in what we said at
19 the end of 270 --

20 MR EDELMAN: Yes.

21 LORD JUSTICE FLAUX: -- that it was a restriction imposed?

22 What we're actually focusing on here is inability to
23 use, and we're making the point that it would be
24 a question of -- it would be a rare case where
25 regulation 6 would lead to inability to use, but it

1 would be a question of fact.
 2 If we had not been deciding that regulation 6 was
 3 a restriction imposed, then that part of the judgment
 4 would be otiose.
 5 MR EDELMAN: Yes, exactly.
 6 LORD JUSTICE FLAUX: We could just have said: it's not
 7 a restriction imposed, full stop.
 8 MR EDELMAN: Yes, or it may or may not be, or qualified it,
 9 "If it's a restriction imposed, then ..."
 10 But we say you decided that categorically.
 11 I understand the point about inability to use. We'll
 12 come on to that, but that's a separate issue. So that's
 13 the first point.
 14 The second point, going back to {N/11/14}, and this
 15 is where, although there's an attempt to reflect the
 16 language, and I don't suggest it's other than a genuine
 17 attempt, the effect of the transplantation of the
 18 language is to change the meaning.
 19 LORD JUSTICE FLAUX: Where is this?
 20 MR EDELMAN: This is "necessarily", the word "necessarily".
 21 Now, what you had said, because in this text it
 22 appears -- says:
 23 "Restrictions imposed' do not necessarily have to
 24 be directed to the insured ... and Regulation 6 is
 25 capable ..."

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1 So those words go.
 2 But the word "necessarily", which we hadn't put in,
 3 is inserted by insurers and by Hiscox, and that has its
 4 origin -- going back to {N/1/83}, it has its origin in
 5 paragraph 269, and the first sentence:
 6 "We were not, however, persuaded by Hiscox's
 7 submission that the 'restrictions imposed' contemplated
 8 by the 'public authority' clause necessarily had to be
 9 directed to the insured, or to the insured's use of the
 10 premises ..."
 11 That's a different use of the word "necessarily".
 12 You're dealing with Mr Gaisman's submission that to be
 13 a restriction imposed it had to be directed to the
 14 insured --
 15 MR JUSTICE BUTCHER: I'm sorry, Mr Edelman, I have not
 16 understood that submission. In what sense is that
 17 a different use from the use proposed in the insurers'
 18 version of the declaration?
 19 MR EDELMAN: Because when you go to the declaration at
 20 {N/11/14}, what you were doing is rejecting a submission
 21 that it had to be, and you were saying it doesn't have
 22 to be. Mr Gaisman says it necessarily has to be, and
 23 you were saying: no, that's wrong. And he says: it
 24 doesn't necessarily have to be directed, which is
 25 a different thing altogether.

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1 MR JUSTICE BUTCHER: I'm sorry, I just do not understand
 2 that, Mr Edelman. Surely where it says in the proposed
 3 declaration "'restrictions imposed' do not necessarily
 4 have to be directed to the insured or the insured's use
 5 of the premises", isn't that exactly the same usage?
 6 MR EDELMAN: Well, in one you were rejecting an attempted
 7 exclusion, and we say that the word "necessarily" is
 8 otiose, and it could be read or misread as they may or
 9 may not be.
 10 LORD JUSTICE FLAUX: I don't understand this point either.
 11 If you read the first part of the sentence -- the first
 12 sentence of 269, another way of saying the same thing
 13 would have been the sentence that begins:
 14 "Restrictions imposed' do not necessarily have to
 15 be directed to the insured or the insured's use of
 16 premises ..."
 17 It's exactly the same thing. It's just putting the
 18 words another way around. The same words are all there.
 19 I think you are tilting at a non-existent windmill here.
 20 MR EDELMAN: Well, I submit what's wrong with "restrictions
 21 imposed do not have to be directed to"; what is wrong
 22 with that?
 23 LORD JUSTICE FLAUX: I think Mr Gaisman would say because
 24 that is not actually what we said in paragraph 269.
 25 MR EDELMAN: All I'm saying is what you said in 269 is

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1 simply because you were restricting a submission by
 2 Mr Gaisman.
 3 Anyway, I've said enough about it.
 4 LORD JUSTICE FLAUX: Right.
 5 MR EDELMAN: But all you were doing was rejecting his
 6 submission. That's why we say you used that word,
 7 because he was saying they necessarily have to be and
 8 you were saying: no, that's not right, he said that,
 9 that's not right, and it's sufficient simply to say --
 10 and if people are reading this, it should be in plain
 11 language -- "'restrictions imposed' do not have to be
 12 directed to the insured". That's it. That's what you
 13 decided. The word "necessarily" doesn't add anything
 14 and could cause confusion.
 15 The next point on the Hiscox -- I should say also
 16 that -- I'm on 17.4. I think I've missed out the fact
 17 that -- but Hiscox Action Group can deal with this --
 18 I think they had some alternative wording for 17.3, but
 19 perhaps they can argue that when they get to it.
 20 Just to point out, I think the word in red at the
 21 top is just a correction of a typographical error.
 22 Mr Gaisman can perhaps confirm that.
 23 LORD JUSTICE FLAUX: "Inability to use", yes.
 24 MR EDELMAN: Then going on to a third point, we agree
 25 with -- on reflection we agree. We accept we didn't

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1 initially disagree with it, the paragraph, but we agree
 2 with HAG that -- and we invite the court to consider
 3 whether it's appropriate to have the last sentence in
 4 black on page 14, "Whether such restriction". That one
 5 is a question of fact. The last sentence:
 6 "Cases in which Regulation 6 would have caused an
 7 inability to use' the insured's premises would be
 8 rare".
 9 LORD JUSTICE FLAUX: Well, that, again, reflects fairly
 10 loyally what we said in the last two sentences of 270.
 11 MR EDELMAN: It does, but that will be there for all to see.
 12 The question is whether it's a suitable matter for
 13 a declaration because it's not a finding; it is in
 14 reality just a prediction of how often the court
 15 expects, on the information it currently has, regulation
 16 6 to result in a favourable finding for policyholders.
 17 We submit that --
 18 LORD JUSTICE FLAUX: If part of the function of all this is
 19 to act, as it were, as a template for either encouraging
 20 or discouraging the pursuit of claims, or encouraging or
 21 discouraging insurers from contesting claims or paying
 22 them, then why isn't including in the declarations what
 23 we said in the last two sentences of paragraph 270 of
 24 assistance?
 25 MR EDELMAN: Well, my Lord, it's a matter of judgment for

1 the court whether it's right or not to include in
 2 declarations matters which are in reality no more than
 3 the court's expectation based on the information it
 4 currently has --
 5 LORD JUSTICE FLAUX: Right.
 6 MR EDELMAN: -- rather than determinations of construction
 7 or law.
 8 LORD JUSTICE FLAUX: Okay.
 9 MR EDELMAN: I say no more about it.
 10 LORD JUSTICE FLAUX: Right.
 11 MR EDELMAN: Then the final point on this paragraph, and
 12 this is perhaps the most important of the points on this
 13 paragraph, is on page 15 where Hiscox attempt to insert
 14 a categorical declaration that businesses in categories
 15 3 and 5 did not suffer an inability to use due to
 16 restrictions imposed within the meaning of Hiscox 1-4.
 17 So it's going even further than what the court said,
 18 that it would be rare to say that it could never happen.
 19 LORD JUSTICE FLAUX: Where do we deal with this in our
 20 judgment?
 21 MR EDELMAN: That's really the point.
 22 What I think Mr Gaisman is trying to take advantage
 23 of is what the court said in relation to prevention of
 24 access clauses. If we go to, for example, paragraph 335
 25 of the judgment, and that's at {N/1/99}. Perhaps

1 I ought to start with 333, because that's category 3,
 2 and you're here dealing with prevention of access, and
 3 just over halfway down the paragraph, when you're
 4 dealing with Ms Mulcahy's examples, you say:
 5 "That may amount to an impediment or hindrance in
 6 the use of the premises, but it is not in any sense
 7 a prevention of access ..."
 8 And category 5, at the foot of the page, about four
 9 lines up you say:
 10 "The offices were not required to close and at most
 11 there was an impediment or hindrance on the use of the
 12 premises ..."
 13 But what we understand Hiscox is seeking to do is
 14 take your conclusions about prevention of access in
 15 relation to category 3 and 5 and apply them also to
 16 inability to use, but we say that's inappropriate where
 17 the court was drawing a distinction between the concept
 18 of access and the concept of use.
 19 The same point can be made in relation to the Hiscox
 20 NDDA clause. That's {N/1/114}, paragraph 391. That was
 21 also an access clause as you can see -- you may
 22 remember, but you can see in the middle of the page, and
 23 what you said about that was at 415, {N/1/120}. You
 24 accept that for categories 3 and 5 it cannot be said
 25 that there was a denial or hindrance of access to such

1 premises:
 2 "We also agree with him that Regulation 6 imposing
 3 restriction on movement other than for permitted
 4 purposes did not impose any denial or hindrance in
 5 access to insured premises, as opposed to use of such
 6 premises."
 7 So what the court was clearly saying, we submit, for
 8 categories 3 and 5, is that regulation 6 doesn't help on
 9 prevention or denial of access, but it may or may not be
 10 relevant to the use.
 11 Now, we're not asking the court to make any
 12 conclusion about the extent to which regulation 6 may
 13 help businesses. You've already said in your judgment
 14 that you anticipate it to be rare. But what we oppose
 15 is any attempt in a declaration to preclude such
 16 categories of business from asserting an inability to
 17 use.
 18 Now, of course we accept -- going back to {N/1/83},
 19 we accept and could not challenge, save on appeal, the
 20 hurdle that you have erected for policyholders to
 21 overcome in relation to inability to use. You have
 22 said, essentially, that only a partial use which was
 23 sufficiently nugatory or vestigial would not prevent
 24 there being a total inability to use; otherwise partial
 25 use would.

1 But, for example, if the professional staff of
2 a firm is unable to go to the premises to work because
3 of the restriction imposed by regulation 6 because they
4 can all work at home and they only used the office space
5 for the vestigial space of collecting post and printing,
6 there's no reason in principle why it should not be at
7 least open to them to argue that there was an inability
8 to use.

9 Similarly, taking a category 3 example, there may be
10 a multi-storey department store which has a small
11 pharmacy area by the entrance, and the entirety of the
12 department store cannot be used but the small corner of
13 one floor, which is open as a pharmacy, can be used.

14 Now, there would be a debate about whether that is
15 sufficient -- that's nugatory or vestigial, but it
16 should be at least open to a category 3 business to say
17 that it was, and that is why we object to the attempt by
18 Hiscox to preclude any such business from presenting
19 an argument. Going back to {N/11/15}, that is precisely
20 what Hiscox is attempting to do.

21 We accept, of course, that it will be in each case
22 a question of fact, but that must remain for the
23 individual case, and it's sufficient if the court --

24 LORD JUSTICE FLAUX: Isn't that exactly what we said at the
25 end of paragraph 268? I mean, the whole of 268 --

1 MR EDELMAN: Yes, exactly.
2 LORD JUSTICE FLAUX: -- is predicated on, and that wasn't
3 intended to be only dealing with businesses other than
4 categories 3 and 5. I can see with category 3 there may
5 be more problems, shops that could stay open. But
6 category 5 businesses, a solicitor's office where
7 everybody works from home because that's what the
8 government tells them to do if they can, but people go
9 in occasionally to collect papers to deliver to counsel
10 or something.

11 MR EDELMAN: Exactly.

12 LORD JUSTICE FLAUX: I mean, it's all a question of fact.

13 MR EDELMAN: Yes, absolutely. We're under no illusion about
14 that and that's what the court found and the barrier,
15 the hurdle that you presented for policyholders. But
16 this declaration goes too far, and it is important.

17 Now, moving on, I think in 17.6 {N/11/15} you'll see
18 again there's some wording suggested. I think I already
19 drew your attention to some on 17.4. There's some
20 alternative wording suggested by the Hiscox Action
21 Group. I'll again let them develop it.

22 Going to the next page of this document {N/11/16},
23 18.3 I have already addressed.

24 LORD JUSTICE FLAUX: You've addressed.

25 MR EDELMAN: And, finally, 19 {N/11/17}, on the next page.

1 As I understand it, Mr Lynch does not pursue this
2 alternative wording. We've got just one small concern
3 about this, the words "an insured is able to
4 demonstrate". Those words should, we submit, be deleted
5 if the Hiscox wording is adopted. The application of
6 policy terms should be expressed neutrally in
7 a declaration. They either do or do not permit
8 recovery. Insofar as there is a question of fact
9 involved, the declarations don't need to address the
10 burden of proof. That's all I say about that.

11 But otherwise, we don't have any particular
12 objection to that addition.

13 LORD JUSTICE FLAUX: Right.

14 MR EDELMAN: I'm just seeing -- from the nature of this case
15 I do have, I am afraid, emails in front of me related to
16 this case because people can't pass me stickers.

17 I think there's been an agreement on a form of wording
18 for 11.2(a), and that should have been sent to your
19 clerk.

20 LORD JUSTICE FLAUX: Yes, I've just got it. But what
21 Mr Salzedo is saying is that part of it may not be
22 agreed.

23 What I suggest, Mr Edelman, is if you have a few
24 minutes to consider that. Or one possibility would be
25 that we deal with everything else, including Mr Hofmeyr,

1 and come back to this at the end of the day.

2 MR EDELMAN: Yes.

3 LORD JUSTICE FLAUX: By which time everybody will have had f
4 chance to further reflect. I mean, I can understand why
5 insurers object to the words in red, but we will hear
6 what everybody has to say.

7 MR EDELMAN: Yes.

8 LORD JUSTICE FLAUX: So it will be a new 11.3. So existing
9 11.3 would presumably become 11.4?

10 MR EDELMAN: Yes.

11 LORD JUSTICE FLAUX: Okay. Let's return to that. Rather
12 than trying to deal with things on the hoof --

13 MR EDELMAN: Yes, absolutely.

14 LORD JUSTICE FLAUX: -- let's return to that later in the
15 day.

16 Okay. Right, so I think Mr Lynch is next.

17 MR EDELMAN: Yes.

18 Submissions by MR LYNCH

19 MR LYNCH: My Lord, thank you.

20 My Lords, the Hiscox interveners adopt Mr Edelman's
21 submissions and I'll try my best to be brief and just to
22 make additional points rather than repeat anything.

23 So if we please go to {N/11/13}, and this was the
24 point, your Lordships will remember, about whether or
25 not Hiscox 2 and 3 are also addressed as well as 1 and

1 4.
 2 Just to add one point to Mr Edelman's submissions,
 3 just to put the point the other way, there's nothing in
 4 the judgment that says anything different about Hiscox 2
 5 and 3., and it would were there a different decision .
 6 So that's ...
 7 LORD JUSTICE FLAUX: It is unfortunate, given that you had
 8 a week in which to give us any corrections to the
 9 judgment or any omissions, and you did -- I'm not
 10 directing this at you, but people generally -- that you
 11 reminded us that we'd failed to deal with one particular
 12 RSA 4 clause, but nobody said to us: you haven't dealt
 13 with interruption in relation to Hiscox 2 and 3. If you
 14 had, no doubt we would have considered the point and
 15 I suspect we would have decided that what we had said
 16 applied to all the Hiscox policies , 1, 2, 3 and 4 --
 17 MR LYNCH: My Lord, well --
 18 LORD JUSTICE FLAUX: -- because of the existence of the
 19 suppliers clause , which can't make sense unless
 20 interruption means more than complete cessation.
 21 Anyway, that's a separate point.
 22 MR LYNCH: My Lord, thank you. For my own part, I am afraid
 23 I regarded it as so clear that the judgment covered all
 24 four that it was not a point that needed pointing out.
 25 But it's a point that's been taken, and I am afraid

1 that's why certainly we didn't raise it .
 2 If we then move on to the next page, please
 3 {N/11/14}, and the wording at the top there, there's no
 4 difference in principle at all between the Hiscox
 5 interveners and the FCA on this. It's simply that this
 6 is a different proposed wording which we think more
 7 faithfully follows the wording of the judgment. But
 8 that's simply a matter for your Lordships, and if
 9 your Lordships prefer the writing in the black font,
 10 then that's a matter for your Lordships. We thought
 11 that this followed it more directly . But there's no
 12 point of principle at all there.
 13 Then looking, please, at the next paragraph,
 14 17.4(a). Just very briefly on this , it seems to us that
 15 your Lordship's judgment at paragraph 270 can only mean
 16 that regulation 6 is capable of being a restriction
 17 imposed, otherwise your Lordships would have introduced
 18 paragraph 270 with, "If we're wrong that regulation 6 is
 19 not capable of being a restriction imposed, then we
 20 would go on to find ..." or simply would have left out
 21 paragraph 270 altogether .
 22 As to the point as to matters being -- or various
 23 types of claim being -- inability to use premises would
 24 be rare, I just simply adopt Mr Edelman's submissions.
 25 Although your Lordships will have seen some examples

1 in our skeleton argument of cases where on the facts we
 2 say that there was an inability to use caused by
 3 regulation 6, those are untested, they were not before
 4 your Lordships, and I don't press them any further on
 5 that point.
 6 So, just going on to the next page, please
 7 {N/11/15}, at 17.4(b), this is the most important of all
 8 of these points, as far as the Hiscox interveners are
 9 concerned, and again we adopt Mr Edelman's submissions.
 10 The first point to make is really what we see as the
 11 short answer to this point: simply your Lordship's
 12 judgment at paragraphs 268 and 270 saying in terms
 13 whether there were such cases would be a question of
 14 fact , and that seems to be a complete answer to the
 15 point.
 16 But in any event, there are examples, which I've
 17 referred your Lordships to. If we could just briefly
 18 turn up, please, {P/11/7}, and from that page and then
 19 on to the next page and then, indeed, the following
 20 page, are some examples, which I repeat are untested
 21 {P/11/8-9}, but they are, on the Hiscox interveners '
 22 case, the examples where it will be argued on the facts
 23 that category 3 and category 5 businesses did suffer
 24 an inability to use their premises due to restrictions
 25 imposed within the meaning of the policies . That seems

1 completely consistent to us with your Lordships '
 2 judgment, which is that it's a matter of fact .
 3 If we take just one of the examples, please, we see
 4 factual example 3 {P/11/8}:
 5 "The insured provides classroom training to law
 6 enforcement and private sector customers. It is ...
 7 Category 5 ... The insured conducts its business from a
 8 training classroom and conferencing facility .
 9 Regulation 6 has impacted the business as ' clients could
 10 not lawfully attend on-site training ' and employees had
 11 to work from home and therefore could not conduct
 12 on-site training . This caused a downturn in turnover."
 13 Now, whether that's right or wrong obviously isn't
 14 to be determined now, but certainly putting the case on
 15 the facts would be consistent with your Lordships '
 16 judgment, paragraphs -- well , it really starts at 266
 17 through to 270, but in particular under 268 and 270.
 18 That's an example.
 19 The problem with the declaration stating in terms
 20 that insureds carrying on business in categories 3 and 5
 21 did not suffer an inability to use their premises due to
 22 restrictions imposed is, one, it is contrary to
 23 your Lordships' judgment but, two, it is obviously far
 24 too categorical and it will simply depend on the facts .
 25 If we then please go to {N/11/10} -- oh, sorry ,

1 excuse me. {N/11/15}. Thank you.
 2 Here, again, there's no issue of principle raised by
 3 the Hiscox interveners at all. It's simply that what
 4 we've done is essentially cut and pasted across from
 5 paragraph 273 of the judgment in a way that we think
 6 more accurately reflects the judgment. So the first
 7 sentence of our proposed wording is effectively the same
 8 as the third sentence of paragraph 273, and the second
 9 sentence of our proposed wording is effectively the same
 10 as the last sentence of paragraph 273, and it's simply
 11 a matter for your Lordships which wording is preferable,
 12 but there's no point of principle at all.
 13 Then if we please go on to, in the same document,
 14 two pages on to {N/11/17}. My learned friend Mr Edelman
 15 rightly has clarified that this is no longer pursued, so
 16 we have no submissions to make on that point.
 17 So that covers all of our points, unless there are
 18 any specific points that I could assist with on those
 19 matters?
 20 LORD JUSTICE FLAUX: So paragraph 19, the insurers' draft is
 21 accepted?
 22 MR LYNCH: Yes, excuse me, subject to Mr Edelman's
 23 clarification.
 24 MR JUSTICE BUTCHER: His point about "an insured is able to
 25 demonstrate"?

1 MR LYNCH: Yes, exactly. We adopt that. Thank you.
 2 LORD JUSTICE FLAUX: I'm sorry, I'm now completely lost. Is
 3 19 -- what is it about insurers' paragraph 19 that is
 4 still in issue, if anything?
 5 MR LYNCH: It was the point on the first line that
 6 Mr Edelman clarified as to "an insured is able to
 7 demonstrate".
 8 LORD JUSTICE FLAUX: Yes.
 9 MR LYNCH: We just adopt that point, but we take no other
 10 point.
 11 LORD JUSTICE FLAUX: Right.
 12 MR LYNCH: My Lord, thank you.
 13 LORD JUSTICE FLAUX: Thank you, Mr Lynch.
 14 Mr Gaisman?
 15 Submissions by MR GAISMAN
 16 MR GAISMAN: Yes, can I deal first with the interruption
 17 point, Hiscox 2 and 3.
 18 There is no assumption, and there shouldn't be
 19 an assumption, that your Lordships either decided or
 20 should have decided every point that was technically in
 21 issue, and your Lordships did not decide, and I'll show
 22 your Lordships for good reason what the position was in
 23 relation to Hiscox 2 and 3.
 24 My learned friends can't agree about this. Mr Lynch
 25 says it's so obvious that your Lordships had decided it

1 that he didn't raise it in the week after the judgment.
 2 Somewhat more realistically, Mr Edelman implicitly
 3 recognises that your Lordships did not decide it because
 4 his submission was that the question is whether or not
 5 your ruling on 1-4 ought to be applied to 2-3. There is
 6 no doubt your Lordships were shown by Mr Edelman most of
 7 the relevant bits, but your Lordships carefully said and
 8 deliberately said that you reached the conclusion about
 9 the meaning of the word "interruption" in relation to or
 10 at least in relation to Hiscox 1 and 4.
 11 Now, your Lordships will have appreciated that there
 12 are two integers between 1 and 4 and your Lordships did
 13 not omit to remember the existence of Hiscox 2 and 3
 14 and, as I shall show your Lordships, this was
 15 deliberate.
 16 At the outset I should correct both of my learned
 17 friends' skeletons which imply, or state, I'm not quite
 18 sure which, that issues around Hiscox 2 and 3 were
 19 debated or argued at length. They were not.
 20 All that happened was that most, if not all, of the
 21 debate on this focused around Hiscox 1, which was much
 22 the fullest wording, and I simply pointed out, and we
 23 didn't have much time available, that you should be
 24 aware of the fact that Hiscox 2 and 3 in particular had
 25 a much smaller number of insuring clauses following on

1 from the stem.
 2 We simply didn't have time to debate. As I shall
 3 tell your Lordship, there were 23 Hiscox 2 wordings and
 4 they're all different. We simply didn't have time to
 5 debate all these points. That wasn't the nature of the
 6 hearing. There were, I think, 39 Hiscox wordings -- 41
 7 Hiscox wordings in total. We had to streamline. At no
 8 stage were your Lordships attempting, nor could you have
 9 attempted, to decide all the points of construction on
 10 all the wordings, not even all the lead wordings.
 11 Now -- so there is no question of a decision by
 12 necessary implication.
 13 Now, why do I say that your Lordships deliberately
 14 reached the limited conclusions? The argument -- we
 15 just need to remember how the argument went on this.
 16 In paragraph 274 -- can we look at {N/1/84}.
 17 I don't know whether your Lordships have a hard copy
 18 judgment, but in case you don't, {N/1/84}.
 19 LORD JUSTICE FLAUX: Paragraph 274.
 20 MR GAISMAN: 274. The starting point was that my argument
 21 was recognised -- my argument around the word
 22 "interruption", which was after all what we were arguing
 23 about, was recognised in principle to have a great deal
 24 of force, or much force, because interruption in the
 25 stem, in principle, had it stood alone, would mean

1 interruption , not interference . If that had been the
 2 only provision , we would have won.
 3 But it wasn't, and if you look at paragraph 274 you
 4 will see that there is a reference to the fact that in
 5 the -- at least in the Hiscox 1 wording, there were, if
 6 I can find what I'm looking for, a number -- it's about
 7 four lines up from the bottom of the page. Second line
 8 up from the bottom of the page:
 9 "As we set out below, it seems to us clear from
 10 a number of those [that means the insuring] clauses , at
 11 least in the Hiscox 1 lead wording, that ' interruption '
 12 ... is intended to mean..."
 13 If we go over the page {N/1/85}:
 14 "... 'business interruption ' generally , including
 15 disruption or interference ..."
 16 So this number of insuring clauses was
 17 a countervailing force against my prima facie forceful
 18 argument.
 19 So that was the context, and exactly the same point
 20 was made in paragraph 409 of the judgment. I am afraid
 21 I haven't got the page for that, I've overlooked that.
 22 Is there any way that we can look at page 409 --
 23 LORD JUSTICE FLAUX: It's the same point, isn't it?
 24 MR GAISMAN: All right. Thank you.
 25 LORD JUSTICE FLAUX: Yes.

1 MR GAISMAN: So, in other words, what your Lordships were
 2 faced with as a matter of construction were two types of
 3 clause pulling in opposite directions : one was the stem
 4 itself , and the other was, in the case of -- the other
 5 was other insuring clauses .
 6 Now, it's obviously the point that the greater the
 7 number of countervailing insuring clauses , the greater
 8 the argument against my prima facie powerful submission
 9 on the meaning of the word " interruption ", and that's
 10 a process of construction which had to be weighed
 11 contract by contract .
 12 Now, in only deciding Hiscox 1 and 4 your Lordships
 13 were recognising two very simple points: first , you
 14 couldn't construe Hiscox 2 and 3 by reference to Hiscox
 15 1 and 4, that's obvious; and, secondly, that the
 16 context, these other insuring clauses in Hiscox 2 and 3
 17 were different from, as indeed they were very different
 18 from, 1 and 4. Your Lordships I think were told,
 19 because it was in our skeleton , that there were far
 20 fewer insuring clauses following the stem in Hiscox 2
 21 and 3.
 22 Now, drilling down just a little into the details ,
 23 if we look at {N/1/118}, my learned friend Mr Edelman
 24 has fastened on the one clause which the various -- the
 25 supplier wording which is present in the Hiscox -- in

1 all the Hiscox 2 wordings.
 2 But if you consider from paragraph 410 onwards, the
 3 first matter your Lordships -- and I was questioned by
 4 Mr Justice Butcher about this -- taxed me with was the
 5 loss of attraction clause, and I made a submission,
 6 which your Lordships didn't accept, that it was in the
 7 wrong place, and what was put to me -- and perhaps,
 8 unsurprisingly , given the questions , ended up in the
 9 judgment in paragraph 410 -- was the loss of attraction
 10 clause . Then there was a point about specified
 11 suppliers , where I had great trouble with my Lord,
 12 Lord Justice Flaux, and unspecified customers too.
 13 However, these clauses are absent from virtually all
 14 of the Hiscox 2 and 3 wordings. The only one that
 15 isn't, as I said , is one about suppliers .
 16 So none of them -- none of these words, none of
 17 these types of cover appear in any Hiscox 3 wording.
 18 "Loss of attraction " does not appear in 18 out of the 23
 19 Hiscox 2 wording and wasn't in the Hiscox 2 lead wording
 20 that your Lordships may have looked at.
 21 The loss of attraction point is the first point
 22 against my prima facie forceful submission that is
 23 mentioned in your Lordship's judgment, being the first
 24 one I was taxed with by my Lord, Mr Justice Butcher.
 25 So what, in fact , you have in Hiscox 1-3 is only one

1 clause , the one Mr Edelman of course has focused on,
 2 pulling in the opposite direction , and not all of these
 3 clauses .
 4 So the situation is that the strength of the
 5 countervailing argument in relation to Hiscox 2 and 3 is
 6 much weaker. I'm not saying it's not there. Who knows,
 7 it might prevail . I'm not ready to argue it , to be
 8 honest. But it was a much weaker argument.
 9 So unsurprisingly , in those circumstances, the court
 10 said we will decide Hiscox 1 and 4, and it would be
 11 quite wrong now, as it were, if judges have hooves,
 12 I don't know, but it would be quite wrong for the court
 13 on the hoof to decide: well , it would be neat to
 14 paper -- to fill this gap.
 15 We didn't get there and it was in the nature of the
 16 hearing -- and no one can complain about this , and
 17 I don't complain about it and no one else can -- that
 18 not every i could be dotted and every t crossed. It
 19 wasn't possible. This wasn't a mistake. It wasn't
 20 a gap. It wasn't decided and your Lordships, with the
 21 greatest of respect, should resist the temptation of
 22 elegance and not decide it now because you haven't heard
 23 full argument on it.
 24 I'm sorry if that's, in principle , a slightly
 25 unsatisfactory conclusion , but it's not an accident and

1 it wouldn't be fair .
 2 LORD JUSTICE FLAUX: So what would then happen to this
 3 point?
 4 MR GAISMAN: This point, my Lords, will have to be debated
 5 hereafter in whatever forum it is debated. If
 6 interruption goes on appeal, then this point will get
 7 wrapped up in that. If it doesn't, it will have to be
 8 debated, for example, in the arbitration that the Hiscox
 9 Action Group has brought.
 10 But your Lordships haven't decided every question .
 11 Of course you haven't. We've just been listening to
 12 submissions to the effect that such and such is
 13 a question of fact. Nor have your Lordships decided
 14 every question of law, as we've also seen this morning
 15 in relation to the operation of the trends clauses .
 16 Your Lordships simply didn't decide this, and it's
 17 not right that your Lordship should assume without
 18 proper argument -- because your Lordship hasn't heard
 19 proper argument, your Lordship still hasn't had a proper
 20 look at these 23 Hiscox 2 wordings -- that we're wrong
 21 about this. It's just a point your Lordships didn't
 22 decide and there's no criticism either of your Lordships
 23 for not deciding it or of anybody else for not having
 24 pointed it out. In good conscience, your Lordships had
 25 enough on your plates .

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1 So that's what I say about that, my Lords, unless
 2 your Lordships want anything more on interruption .
 3 LORD JUSTICE FLAUX: No, thank you.
 4 MR GAISMAN: I want to move on, because it's logical to do
 5 it in this way, to categories 3 and 5.
 6 Now, this is a much more formidable and serious
 7 argument than it has been given credit for and perhaps
 8 we didn't do it full justice in our skeleton .
 9 Your Lordships would have seen the strength of the
 10 argument if my learned friend Mr Edelman had read the
 11 second half of paragraph 415 and not just the first .
 12 But there we are, we're all under pressure of time.
 13 Now, I make no apology for reading this judgment as
 14 a whole. Hiscox's proposed declaration on this point is
 15 supported by what your Lordships said in relation to the
 16 access clauses . It is quite legitimate , as long as we
 17 do so fairly and accurately, to rely on one in the
 18 context of the other. Unlike other submissions, I am
 19 proceeding on the basis that this judgment is logically
 20 coherent .
 21 Now, the shape of the argument is this , my Lords,
 22 and there are four basic propositions . We'll look at
 23 the judgment when I've indicated what the propositions
 24 are .
 25 First , in relation to the prevention of access

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1 clauses, the court clearly held -- I'll just give you
 2 the reference -- at paragraphs 333 and 433 that there
 3 was no prevention of access as regards categories 3 and
 4 5 businesses because they weren't subject to compulsory
 5 closure under regulations 4 and 5. In the same
 6 paragraphs the court rejected the FCA's submission that
 7 regulation 6 meant that there was a prevention of access
 8 in relation to category 3 and 5 businesses . That's the
 9 first point .
 10 The second point is this : as we will see, in the
 11 same paragraphs the court contrasted "accessing
 12 premises" with "using premises" and it held that, at
 13 most, your Lordship's words, regulation 6 may have
 14 created an impediment or hindrance in use for category 3
 15 and category 5 businesses , as opposed to an inability to
 16 access them: at most a hindrance or impediment in use.
 17 Thirdly, and importantly, the court also held for
 18 the purpose of the Hiscox public authority clause that
 19 inability to use requires something -- and I quote --
 20 " significantly different from hindering in use or
 21 similar ". That's paragraph 268.
 22 So mere impediment or hindrance in use of the
 23 premises is therefore insufficient for a category 3 or
 24 category 5 insured to be covered under the public
 25 authority clause .

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1 LORD JUSTICE FLAUX: Can you just give me that reference
 2 again? 268 is it?
 3 MR GAISMAN: Yes, {N/1/83} for those who prefer to read it
 4 in electrons .
 5 LORD JUSTICE FLAUX: I've got it in hard copy, Mr Gaisman,
 6 as you can imagine. Bedtime reading every night .
 7 MR GAISMAN: Yes. Second line:
 8 "'Unable to use' means something significantly
 9 different from 'hindered in using' or similar ."
 10 By "similar" no doubt your Lordships had in mind
 11 hindrance or impediment, which was the language that
 12 your Lordships used elsewhere .
 13 LORD JUSTICE FLAUX: Yes.
 14 MR GAISMAN: So that's the third stage of the argument.
 15 And the fourth stage is this : yet further the court
 16 also held, as we will see, that even if categories 3 and
 17 5 businesses' use of premises was affected by regulation
 18 6, that was not, contrary to the requirements of the
 19 Hiscox PA clause, an inability to use premises due to
 20 restrictions imposed, ie due to mandatory government
 21 action. So that was a separate point. That critical
 22 point was in the second half of paragraph 415 after my
 23 friend had stopped reading from that paragraph.
 24 LORD JUSTICE FLAUX: Can we have a look?
 25 MR GAISMAN: Let's look at it now by all means.

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1 Paragraph 415, {N/1/120}. I want to come back to this,
 2 but since I've been asked to identify it.
 3 The point is -- can we pick it up four lines from
 4 the bottom. This is categories 3 and 5, this paragraph,
 5 and what it says is:
 6 "At most..."
 7 As I said, those are your Lordship's words:
 8 "... there was a restriction on use of the offices
 9 because they could work from home, but since the
 10 Regulations were silent about businesses in Category
 11 5..."
 12 And I might add a fortiori in relation to category 3
 13 which were expressly allowed to stay open:
 14 "... it cannot be said that any such restriction on
 15 use was imposed by or by order of the government."
 16 Or, I would add, a public authority, which
 17 (inaudible).
 18 So that's the shape of the argument, my Lord, and
 19 there's no escape from this. That's what your Lordships
 20 decided.
 21 Now, let's start -- let's break it down a bit.
 22 Category 3 first.
 23 That category 3 businesses did not suffer
 24 an inability to use their premises due to restrictions
 25 imposed is the irrefutable consequence of your Lordships

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1 accepting our submission that "restrictions imposed"
 2 meant something mandatory. Your Lordship won't have
 3 forgotten that bit of your Lordships' judgment,
 4 paragraph 266. We needn't look at it. So in relation
 5 to categories 3 and 5 that was the 26 March regulations
 6 or nothing.
 7 Now, as your Lordships will definitely remember,
 8 category 3 businesses were expressly permitted to stay
 9 open by those regulations, and it necessarily follows
 10 that it was a reasonable excuse under regulation 6 to
 11 leave home in order to go to them, or indeed to work for
 12 them, or indeed to obtain goods or services from them.
 13 Thus, no category 3 business could ever say that
 14 there was an inability to use its premises as a result
 15 of a restriction imposed, given the court's ruling at
 16 paragraph 266.
 17 My learned friend Mr Edelman talked about
 18 a department store with a tiny little pharmacy outlet
 19 and said that was a category 3 business. Well, that
 20 business wouldn't be a category 3 business, taking the
 21 business as a whole. It's an example that, so to speak,
 22 isn't a fair one.
 23 LORD JUSTICE FLAUX: It's your favourite example, isn't it,
 24 Mr Gaisman, of Waitrose in Salisbury?
 25 MR GAISMAN: Well, I haven't been there since I last

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1 appeared before your Lordship. I've transferred my
 2 loyalties to Ringwood.
 3 LORD JUSTICE FLAUX: That's the point though, isn't it? It
 4 remained open throughout and it could not be said --
 5 well, it's quite difficult to say there was an inability
 6 to use merely because you had to queue in the rain, but
 7 even if it could, it couldn't be said it was as a result
 8 of restrictions imposed by the --
 9 MR GAISMAN: But your Lordships have already held it's not
 10 an inability to use. At most, it's a hindrance and
 11 impediment.
 12 LORD JUSTICE FLAUX: Quite.
 13 MR GAISMAN: That's the earlier stage of the argument.
 14 Now, I've put the arguments before your Lordship.
 15 We just need to pick up the relevant paragraphs of the
 16 judgment.
 17 LORD JUSTICE FLAUX: Yes.
 18 MR GAISMAN: My learned friend Mr Edelman took you to some
 19 of these. 333 is the first, which is at {N/1/99}. We
 20 start with category 3 and your Lordships recall, if you
 21 are with me:
 22 "As the FCA accepts, they were permitted to carry on
 23 business by Regulation 5. Since none of them had to
 24 close ... there is simply no qualifying prevention of
 25 access."

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1 Then we get on to reduced footfall, and you say:
 2 "That may amount to an impediment or hindrance in
 3 the use of the premises..."
 4 But your Lordships have held in 268 that
 5 an impediment in use of the premises is not the same as
 6 an inability to use. For an inability to use, something
 7 more, indeed much more, needs to be -- is required. So
 8 I think that's probably the relevant -- sorry, I should
 9 read the end of that.
 10 Yes, I could just, perhaps -- the last sentence:
 11 "Where the policyholder chose to close down the
 12 business because of reduced footfall or for some other
 13 reason, that is not a qualifying prevention of access,
 14 because the closure was not due to government actions or
 15 advice, since the relevant actions or advice permitted
 16 the premises to remain open."
 17 And that is in a way similar to the point at the end
 18 of 415.
 19 Then we get on to 433, please, on {N/1/125}. This
 20 is in the context of MSA, prevention of access clause,
 21 and again your Lordships are dealing with categories 3
 22 and 5. First you say no question of prevention of
 23 access. Then there's this sentence:
 24 "It is no answer for the FCA to rely upon the
 25 restrictions on movement imposed by Regulation 6 ... to

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1 argue that customers' ability to visit many premises was
2 severely limited. At most, in the case of businesses
3 which remained open or were not required to close, that
4 was a hindrance in use, not a prevention of access."

5 When you tie up that finding or holding with what
6 I've shown your Lordship in paragraph 268, which is that
7 an inability to use, which is the word in our clause,
8 requires something, your Lordship said, something
9 significantly different from a hindrance of use,
10 paragraph 268, all these paragraphs fit together.
11 Your Lordships will have meant, I continue to assume, to
12 express yourselves consistently through the judgment.

13 Then we get to category 5 businesses, which were not
14 required to close. What your Lordships did there, you
15 described the impact of regulation 6 on those businesses
16 in terms that again fall short of anything like
17 an inability to use. That's the first point.

18 And the second point -- and this is at the end of
19 415 -- you said that even if the use of category 5
20 premises was restricted, that was not the consequence of
21 a restriction imposed. The language in our clause, our
22 PA clause, was "inability to use due to restrictions
23 imposed".

24 There are three paragraphs I need to look at, but
25 the first I already have and I won't go back to. That's

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1 paragraph 433.

2 Then we need to look at paragraph 335, which you
3 find at {N/1/99}. We're now on category 5, and category
4 5 consists of businesses, as your Lordships say there,
5 which were permitted to stay open. And then there's
6 a discussion about regulation 6, and you say, about five
7 lines down:

8 "It is nothing to the point that clients or
9 customers did not visit the offices of their accountant,
10 lawyer or financial adviser because of the restrictions
11 on movement imposed by Regulation 6... The offices were
12 not required to close and at most there was
13 an impediment or hindrance on the use of the premises,
14 nothing which amounted to a prevention of access."

15 Do I go on?

16 Then there's the example of the solicitors. I'm not
17 sure -- well, would your Lordship just cast an eye over
18 the rest of that paragraph.

19 Now, we then come, critically, to paragraph 415.
20 I know your Lordship has looked at that. My learned
21 friend, as I might have done if I were him, stopped
22 after about seven lines because what he stops at is he
23 read the sentence "We also agree" about five lines down.
24 Sorry, I should have said, this is {N/1/120} for those
25 who are... so line 5:

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1 "We also agree with him that Regulation 6 imposing
2 restrictions on movement other than for permitted
3 purposes did not impose any denial or hindrance in
4 access to insured premises, as opposed to use..."

5 And my learned friend stopped there. You can't stop
6 there. You need to read on.

7 Then there's discussion of people who could work at
8 home visiting their offices, and then, four lines up
9 from the bottom:

10 "At most there was a restriction on use of the
11 offices ..."

12 That's the same, I take it, as a hindrance or
13 an impediment:

14 "... on use of the offices because they could work
15 from home..."

16 That's the first point. But then the second point:

17 "... but since the Regulations were silent about
18 businesses in Category 5 [as indeed they were], it
19 cannot be said that any such restriction on use was
20 imposed by or by order of the government."

21 So that's a quite separate point. How can
22 restrictions be imposed on category 5 businesses by law
23 when there is nothing in the law that mentions category
24 5 businesses? That was the point we made, and that was
25 a point that we made that your Lordships accepted.

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1 So that is why, if we can now go back to the
2 declaration that we seek in relation to this, which is
3 in 17.4(b). I think it's {N/11/15}. I've been working
4 on N/10, I am afraid, because... well, never mind why.

5 That is why we have expressed a declaration the way
6 we have:

7 "Insureds carrying on businesses in Category 3 and
8 Category 5 did not suffer an 'inability to use' their
9 premises due to 'restrictions imposed' within the
10 meaning of Hiscox 1-4."

11 That is exactly, I respectfully submit, what
12 your Lordships decided in paragraph 415 of the judgment.

13 The truth is that when we go back to the paragraphs
14 my learned friends rely on at 267-270, one's got to
15 construe this judgment as a whole, and the trouble is
16 that there were lots of points on this Hiscox public
17 authority clause which were closely related, and there
18 were seven classes of business and we were considering
19 all of these often together.

20 It's quite difficult, if this judgment is
21 consistent, my Lord -- and I take it that it is --
22 then --

23 LORD JUSTICE FLAUX: Well, it's certainly intended to be.

24 MR GAISMAN: Quite. All that your Lordships were saying is
25 whether there's an inability to use is always a question

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1 of fact. Well, of course it is. Of course it's
 2 a question of fact if you just say that, but there are
 3 other principles at stake here.
 4 LORD JUSTICE FLAUX: Mr Gaisman, isn't the point --
 5 Mr Edelman addresses the inability to use and how
 6 inability to use may be a question of fact. Leave to
 7 one side for the moment what we've said about it being
 8 at most a hindrance in use, and I follow your point on
 9 that, but isn't the short answer to all of this that,
 10 given the finding in 415, that at most there was
 11 a restriction on use but it could not be said that it
 12 was imposed by order of the government, the beginning
 13 and the end of it because, whatever the facts are,
 14 that's a complete answer.
 15 MR GAISMAN: Or to put the point another way, my Lord,
 16 supposing that your Lordship had used the word
 17 "inability" in that last sentence. So it read:
 18 "Even if there was an inability of use, it cannot be
 19 said that any such inability on use was imposed by order
 20 of the government."
 21 It's another way of putting the same point. But
 22 your Lordship is quite right, there were two separate
 23 questions here.
 24 LORD JUSTICE FLAUX: All that your declaration at 17.4(b)
 25 does is to say "did not suffer an inability to use due

1 to restrictions imposed within the meaning of Hiscox
 2 1-4".
 3 MR GAISMAN: Yes, which is exactly what your Lordships said
 4 in paragraph 415.
 5 LORD JUSTICE FLAUX: It's exactly what we said in 415.
 6 MR GAISMAN: Yes.
 7 LORD JUSTICE FLAUX: Albeit in the context of restriction on
 8 use, but clearly restriction on use by definition is
 9 less than inability to use.
 10 MR GAISMAN: Yes. So, my Lords, that's the submission.
 11 There may be an answer to it but it hasn't yet been put
 12 forward against me.
 13 Now, can I then move on from there to declaration
 14 17.4(a) on the previous page.
 15 Now, there's -- I'm really going to deal first with
 16 the issues between me and the FCA.
 17 There are four problems with the FCA's draft in
 18 front of your Lordships' 17.4(a). The first is -- the
 19 first sentence treats regulation 6 as ipso facto
 20 a restriction imposed, and that is not what the court
 21 decided in relation to categories 3 and 5. The language
 22 you've got at the moment is:
 23 "The words 'restrictions imposed' mean something
 24 mandatory... and in particular Regulation 2 ... 4 and 5
 25 and [they add] 6."

1 It's quite clear that regulation 6, whatever the
 2 effect of my previous submission, is in a different
 3 class from regulations 2, 4 and 5 because 2, 4 and 5
 4 shut down businesses and 6 kept people at home. But
 5 this is insurance of premises, of business premises. So
 6 our wording is better because it treats regulation 6 as
 7 not the same.
 8 Your Lordships will search paragraphs 267 to 270 in
 9 vain for any such elevation of regulation 6.
 10 LORD JUSTICE FLAUX: You deal with this point by saying that
 11 regulation 6 is capable of being a restriction imposed
 12 on the facts in any given case.
 13 MR GAISMAN: The humorous aspect of that submission is that
 14 both of my learned friends have said exactly that during
 15 the course of their submissions. Mr Edelman said it may
 16 or may not be, which I take to be the same as it's
 17 capable of being, and Mr Lynch, for which I must buy him
 18 a drink in due course, actually said that the right
 19 thing to say was that it was capable of being, having
 20 momentarily overlooked the fact that those were the
 21 terms of the definition.
 22 Now, it is capable of being a restriction imposed
 23 because it's mandatory and it is said to apply to
 24 businesses which were ordered to close.
 25 LORD JUSTICE FLAUX: Mr Lynch's formulation of this

1 particular provision appears to recognise in the last
 2 sentence that it's a question of fact whether regulation
 3 6 -- well, no, maybe that's dealing with inability to
 4 use. He doesn't really deal with regulation 6. He
 5 certainly doesn't seem to think that regulation 6 is
 6 necessarily within the mandatory restrictions imposed.
 7 MR GAISMAN: He's more dovish on this point but he's more
 8 hawkish on a different point. But anyway,
 9 your Lordship's not counting heads.
 10 So that's the first point, that the FCA overpromote
 11 regulation 6 in your Lordships' judgment.
 12 The second point is that they don't like our words,
 13 perhaps -- I was going to say they don't like our words
 14 "in particular" but I see that the words "in particular"
 15 are there.
 16 Sorry, I've rather lost touch with what the point
 17 I'm trying to make is about that. It seems that the FCA
 18 accept the words "in particular". Anyway, "in
 19 particular" is in your Lordships' judgment at 267. So
 20 that's all right. Maybe those words have come back in.
 21 Sorry, I'm making a point on a previous draft, I think.
 22 Thirdly, I hope I don't have to spend time on the
 23 word "necessarily".
 24 And, fourthly, my learned friend appears to be, by
 25 looking at the red about six lines down, to be treating

1 social distancing and related action as being comprised
 2 within regulation 6, because he says "Social Distancing
 3 and Related Action save for Regulation 6...", implying
 4 that there are some respects in which social distancing
 5 and related action may have fallen within regulation 6.
 6 Well, that's not right.

7 LORD JUSTICE FLAUX: Regulation 6 was staying at home as
 8 much as possible, working from home and so forth.

9 MR GAISMAN: Yes, nothing to do with social distancing.

10 LORD JUSTICE FLAUX: Nothing to do with social distancing.

11 MR GAISMAN: And social distancing was never the law and
 12 your Lordships have held that it therefore couldn't be a
 13 restriction imposed because restrictions imposed have to
 14 have the force of law.

15 LORD JUSTICE FLAUX: Yes.

16 MR GAISMAN: So all of these drafting points, perhaps
 17 unusually, should be resolved in favour of one party,
 18 namely Hiscox.

19 However, on the plus side, although my learned
 20 friend Mr Edelman unfortunately retreated from this
 21 position for the first time in oral argument a few
 22 minutes ago, what everybody had agreed about, apart from
 23 the Hiscox Action Group, was that the declaration could
 24 contain the words:
 25 "... whether regulation 6 would have caused an

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1 inability to use the premises would be rare."

2 My learned friend's position on that met with
 3 a certain amount of resistance. That's what
 4 your Lordships said and, by the way, that wasn't
 5 confined or even directed to regulations 3 and 5. It
 6 was a general statement.

7 The important point is that my learned friend
 8 Mr Edelman said: well, it shouldn't be in the
 9 declaration because it's just a prediction. It's not
 10 a prediction. It is an expression of opinion by
 11 your Lordships about the way in which these regulations
 12 work, and since it's in the judgment there can be no
 13 good reason why it should not be also in the
 14 declaration.

15 Now, that said, and I'm not quite sure to what
 16 extent it was really pursued in the light of
 17 your Lordship's resisting Mr Edelman's retreating from
 18 the word "rare", the Hiscox Action Group basically had
 19 told your Lordships that your Lordships were wrong on
 20 this. Where your Lordships said this was a rare case
 21 Mr Lynch's position is no, it's not a rare case.

22 LORD JUSTICE FLAUX: Well, they will be able to establish in
 23 any given case whether they're right or wrong, won't
 24 they?

25 MR GAISMAN: Yes.

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1 LORD JUSTICE FLAUX: On the basis of the material that we
 2 were given at the time, we concluded that it would be
 3 a rare case, and at the moment I continue to consider
 4 that's a fair conclusion on the basis of material we
 5 had, which is all we can go on.

6 MR GAISMAN: Yes, my Lord, but your Lordships had quite
 7 a lot of material, including all the assumed facts, and
 8 argument was addressed to this very point. The FCA
 9 addressed it on Day 2 at pages 149 to 151
 10 {Day2/149-151}. It was addressed in the HAG skeleton.
 11 Your Lordships weren't, as it were, taking a flyer at
 12 this.

13 But it's not just a question of fact; it's also
 14 a question of how these regulations work as a whole.

15 Now, I think that's probably all I need to say on
 16 17.4(a).

17 MR JUSTICE BUTCHER: Well, Mr Gaisman, just before you leave
 18 17.4(a), going back to your point about social
 19 distancing and related action save for regulation 6 --

20 MR GAISMAN: Yes.

21 MR JUSTICE BUTCHER: -- isn't this all to do with the
 22 definition of social distancing and related action which
 23 appears in 14.5(b)?

24 MR GAISMAN: Yes.

25 That may be right, sorry. Could I ask my Lord

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1 Mr Justice Butcher to ... no doubt only for a few
 2 seconds.

3 That may be right. I think it's just a carve-out
 4 from --

5 MR JUSTICE BUTCHER: I think it's just a carve-out from the
 6 definition of social distancing and related action.

7 LORD JUSTICE FLAUX: I don't think anything turns on this
 8 point, Mr Gaisman.

9 MR GAISMAN: All right, I think I'll leave that point.

10 Can I move on to declaration 17.3. I'm sorry to be
 11 going backwards. This is another point on which HAG are
 12 out on a limb.

13 It's difficult to appreciate what's going on here
 14 because you've got a wab(?) of black text and then a wab
 15 of green text, but what's going on here is this: the FCA
 16 and Hiscox are agreed on this form of this declaration.
 17 If we can go back to the previous page your Lordships
 18 see that the agreed form of this begins:
 19 "As regards Hiscox 1-4, 'inability to use' means
 20 something significantly different from being hindered in
 21 using or similar."

22 Now, we've seen that that's what your Lordships said
 23 in terms, in those terms, in paragraph 268 of the
 24 judgment. That's why the FCA and Hiscox agreed that
 25 that should be in.

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1 What you won't have picked up is that that is the
 2 essential difference . That's left out of the Hiscox
 3 Action Group's language. They don't like it .
 4 LORD JUSTICE FLAUX: Well, you credit us with insufficient
 5 reading of what we're given, Mr Gaisman. Certainly
 6 speaking for myself, I've picked up exactly that point.
 7 MR GAISMAN: Yes, that's very wrong of me. The drinks bill
 8 is going up and up.
 9 LORD JUSTICE FLAUX: The short answer to the point is your
 10 rendition , yours and the FCA's agreed rendition -- and
 11 I think it's accepted that it should be " inability "
 12 rather than " ability " -- is agreed between you and
 13 reflects the wording of the judgment.
 14 MR GAISMAN: Yes, that's the short point. There's no reason
 15 not to accept the FCA and Hiscox's agreed text on 17.3.
 16 Now, 17.6, if we can go forward to that, please, on
 17 the next page {N/11/15}, I think this is another case,
 18 if I've got this right -- I will be corrected if
 19 I'm wrong -- where the FCA and Hiscox have agreed the
 20 language. The objection on this occasion to the Hiscox
 21 Action Group's addition of that complicated last
 22 sentence beginning "the required link" is that it's
 23 simply unnecessarily complicated. The point is
 24 perfectly sufficiently captured in the text which the
 25 FCA and Hiscox have agreed.

1 I think the last point I need to mention is
 2 declaration 19, but I think that's gone, isn't it? Yes,
 3 exactly, I think peace has broken out on this. The
 4 Hiscox Action Group has abandoned its objection to the
 5 text, Mr Edelman has proposed some additional words and
 6 we don't object to the additional -- removing some words
 7 and we don't object to the removal of those words.
 8 Thank you.
 9 LORD JUSTICE FLAUX: I'm not sure I've picked up which words
 10 are to be removed.
 11 MR GAISMAN: Can we go forward to declaration 19, please,
 12 the next page {N/11/16}. Next page please. Thank you.
 13 Oh, it's the page after that, I do apologise {N/11/17},
 14 yes, it's the words "that an insured is able to
 15 demonstrate".
 16 MR JUSTICE BUTCHER: I think specifically it's the words
 17 "an insured is able to demonstrate".
 18 MR GAISMAN: Yes, exactly. Thank you. Got there in the
 19 end.
 20 Those are my submissions, my Lords.
 21 LORD JUSTICE FLAUX: Yes, I see. Thank you, Mr Gaisman.
 22 Submissions in reply by MR EDELMAN
 23 MR EDELMAN: My Lord, that was a very lengthy spell from
 24 Mr Gaisman on relatively few words, but can I start my
 25 reply by dealing with the inclusion of Hiscox 2 and 3 on

1 the interruption point.
 2 What clearly was on the agenda for the court were
 3 the lead wordings in each category. They featured in
 4 Mr Gaisman's skeleton and I've been given these
 5 references , so I hope they're right , {1/14/4}. They
 6 address the differences in the wordings and, in
 7 particular , the number of the insuring clauses . If we
 8 go on to the page, they address the differences between
 9 Hiscox 1 and Hiscox 2. So that's all in there, and then
 10 they go on to do the same for Hiscox 3.
 11 So those were all addressed, and if we go to
 12 {1/15/3} you can see that, with his usual thoroughness,
 13 Mr Gaisman goes through all of the policies . One could
 14 keep turning the pages and go to the next page {1/15/4}.
 15 He identifies -- all the way through Hiscox 2, he
 16 identifies the common insuring clause. You can see he
 17 identifies that there's a suppliers clause in there .
 18 So it was all set out in his appendix, and it was
 19 all argued as to what " interruption " meant by reference
 20 to those different forms of wording.
 21 If one looks again at Hiscox 2, Mr Gaisman said
 22 that -- if we go to {B/8/29}, he said that in Hiscox 1
 23 there were a number of clauses that could be referred
 24 to. {B/8/29}, thank you. You can see here that there is
 25 in Hiscox 2 a limited number of clauses. You can see

1 there's premises access, suppliers, public utilities --
 2 go to the next page, please {B/8/30} -- and public
 3 authority. So there were only four clauses .
 4 So we say it's not really a question of how many
 5 contrary clauses you need to help you to decide on the
 6 meaning of " interruption "; you have the word appearing,
 7 and in this case it appears only in the context of four
 8 insuring clauses, one of which is flatly contrary, and
 9 you've held is contrary, to Mr Gaisman's suggested
 10 meaning of the word " interruption ". You've addressed
 11 the effect of a clause such as that in the context of
 12 the use of the word " interruption ". It was before you,
 13 and there is no reason why Hiscox should be entitled to
 14 wriggle out of it .
 15 It's a very unsatisfactory state of affairs that
 16 Mr Gaisman puts forward when his arguments have been
 17 rejected and he is now trying to wriggle out of
 18 an adverse finding . He says: well, this can all be
 19 wrapped up in an appeal. But how can it be wrapped up
 20 in an appeal if there's no declaration? In a sense,
 21 that of itself demonstrates the necessity for
 22 a declaration so that it can be wrapped up in an appeal.
 23 LORD JUSTICE FLAUX: Well, Mr Edelman, one can't help
 24 noticing that the specific wording chosen is what's
 25 known as gun cover, insurance for the gun trade.

1 Whether it is a gun manufacturer or a gun shop,
 2 supplying shotguns, the chance of there being only one
 3 supplier, either of parts or of anything else, is
 4 unlikely in the extreme. Most gun shops, if it's gun
 5 shops, stock a wide range of different manufacturers'
 6 guns. So you have to try and make sense of the
 7 suppliers clause. It's very difficult to make sense of
 8 it if "interruption" means complete cessation.
 9 MR EDELMAN: And you have held that generally in relation to
 10 the other clause, so it's no great leap into the unknown
 11 or the unargued for you to simply endorse the fact that
 12 your conclusions in respect of the Hiscox 1 and 4 lead
 13 wordings apply to the Hiscox 2 and 3 lead wordings
 14 because they both contain a critical clause which was
 15 part of your reasoning. It wasn't: well, there's the
 16 suppliers clause but there are all the others. You did
 17 list all the indicia which were contrary to Mr Gaisman's
 18 submissions, but any one of them would have done. Maybe
 19 there might have been an argument if there had only been
 20 1 out of 20, but here it's 1 out of 4, if we're doing
 21 numbers.
 22 So we say it's a very unattractive and opportunistic
 23 submission by Mr Gaisman and it ought to be rejected.
 24 If necessary, if the court considers it appropriate to
 25 issue some sort of supplemental judgment or ruling, then

1 that should be done.
 2 But we submit it's sufficient on the judgment as it
 3 stands and your reasoning to give the declaration on the
 4 basis that it inevitably followed from your reasoning in
 5 respect of 1 and 4, and you did specifically refer to
 6 taking Hiscox 1 as a lead wording for this purpose. The
 7 court well knew that it was only a lead wording in the
 8 technical sense for the other Hiscox 1 type wordings,
 9 but you referred to it in this sense as taking this as
 10 the lead wording for the purposes of this point.
 11 LORD JUSTICE FLAUX: Right.
 12 MR EDELMAN: Now, I think the other substantive point that
 13 I need to reply on is the category 3 and 5 point.
 14 There's a certain forensic sleight of hand by
 15 Mr Gaisman, because what he does is focuses heavily on
 16 what you said about the Hiscox NDDA clause, whereas, of
 17 course, what we are addressing here is the Hiscox hybrid
 18 clause.
 19 If we go back to {N/11/15} -- yes, thank you -- we
 20 can see that the NDDA clause declarations start at 18,
 21 and this is not in it. If we go back a page we can see
 22 that this is addressing the Hiscox 1-4 hybrid clauses.
 23 Now, the form of the clause that the court was
 24 addressing in the passages which Mr Gaisman was so keen
 25 to show you and to demonstrate, so he thought, that

1 I was ducking something in a paragraph, were addressing
 2 the NDDA clause at {N/1/114}.
 3 LORD JUSTICE FLAUX: Is that to be read as a whole,
 4 Mr Edelman --
 5 MR EDELMAN: Yes, it is.
 6 LORD JUSTICE FLAUX: -- and I agree with Mr Gaisman about
 7 that, then what we said in most of paragraph 415 is
 8 flatly against your submissions on this point, because
 9 if -- even assuming that there was a restriction on use
 10 which amounted to an inability to use, the effect of
 11 what we were saying is that it wasn't imposed by order
 12 of the government, and that wasn't something where we
 13 were saying may or may not be, it all depends on the
 14 facts; it was quite a categorical finding, albeit in the
 15 context of a different wording.
 16 MR EDELMAN: Yes, but it's not actually what you said on the
 17 wording itself, with respect.
 18 LORD JUSTICE FLAUX: Where is that?
 19 MR EDELMAN: If we go back to what you were saying about
 20 when you were focusing -- that was, of course, dealing
 21 with prevention of access imposed, the imposed
 22 prevention of access. And the hybrid clause, it was
 23 inability to use due to restrictions. So under the
 24 NDDA clause you were talking about the imposition of
 25 a restriction of access. So the prevention of access

1 had to be imposed, and that was the context in which you
 2 said what you said at 415.
 3 If you want to look at the NDDA clause again, and
 4 I think it is important that you do so, it's at
 5 {N/1/114}, paragraph 391.
 6 So the question you were addressing in 415 was: was
 7 the denial or hindrance of access itself imposed by
 8 a civil or statutory authority? And when you go to 415,
 9 I tend to read this in the context of what you were
 10 considering at the time. That's at {N/1/120}. You were
 11 talking about what was directly imposed. Was something
 12 imposed by the government?
 13 Whereas when we come back to the hybrid clause at
 14 {N/1/77}, it's posing a different question. It's asking
 15 whether you are unable to use your premises and whether
 16 that has been caused by restrictions imposed. It's not
 17 requiring, as the NDDA clause did, that the
 18 restriction -- that the restriction itself imposed the
 19 inability to use. It merely requires a causative link
 20 between the restriction and the inability to use, and
 21 that's the fundamental distinction between those two
 22 clauses. And that is why my Lord expressed yourself the
 23 way you did at 415, but then when you were dealing with
 24 this, which is talking about the inability to use being
 25 caused by restrictions imposed, as opposed to being

1 directly imposed itself , as the NDDA clause requires,
 2 what you said was, going back to page {N/1/83} --
 3 LORD JUSTICE FLAUX: Paragraph?
 4 MR EDELMAN: 270. That's why you were addressing the
 5 paragraph differently , and correctly differently ,
 6 because what you were saying about regulation 6 there
 7 is: we did not consider it could be said that regulation
 8 6 -- although we considered risks which were not
 9 directed -- we did not consider it could be said the
 10 regulation amounted to a restriction imposed of all
 11 insureds .
 12 So you weren't by any means -- what you were saying,
 13 necessarily , was that regulation 6 could -- and the
 14 language you've used was "lead to an inability to use",
 15 and that's the fundamental distinction between the two
 16 types of clauses and the way the court expresses its
 17 reasoning that Mr Gaisman is simply eliding .
 18 This is a causation question .
 19 LORD JUSTICE FLAUX: Okay. Right.
 20 MR EDELMAN: And that's a simple question: did the
 21 restriction , the regulation 6, cause an inability to
 22 use, as opposed to impose an inability to use, which is
 23 what the NDDA clause, albeit using access, what that was
 24 addressing?
 25 So the two passages in your judgment are, with

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1 respect, utterly compatible, bearing in mind that they
 2 are addressing a wording which on the face of it may not
 3 look that different , but actually are. One's requiring
 4 the result to be something which has been directly
 5 imposed, and the other something which is the causal
 6 result of a restriction that is imposed, and it doesn't
 7 say what the restriction -- how the restriction must
 8 operate, whereas the NDDA clause does. It requires the
 9 prevention of access to be imposed, not it to be the
 10 result of some sort of restriction .
 11 That's why Mr Gaisman is fundamentally wrong in
 12 seeking to carry forward what you said about the
 13 NDDA clause to the very different hybrid clause .
 14 LORD JUSTICE FLAUX: Yes.
 15 MR EDELMAN: And why it is simply a matter of causation.
 16 And that's why he misunderstood or mischaracterised the
 17 references that both I and Mr Lynch made in relation to
 18 regulation 6, because what we said was -- and if
 19 I didn't, I misspoke. What I intended to say was that
 20 regulation 6 is capable of causing an inability to use
 21 for various businesses. It is a restriction imposed and
 22 you have not said that it isn't.
 23 I quite accept that for the purposes -- if the
 24 NDDA clause, going back to that -- it may be useful just
 25 to see it again, the NDDA clause at {N/1/114}.

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1 I quite accept that if the NDDA clause had said
 2 "an inability to use imposed by any civil or statutory
 3 authority ", and that had been the language in the hybrid
 4 clause, that Mr Gaisman would have a fair point .
 5 But that's what you were talking about, and when
 6 Mr Lynch and I used the word "capable of causing", that
 7 was referring to the causation requirement in the hybrid
 8 clause, and that is at the heart of the error in
 9 Mr Gaisman's approach. He's comparing apples and pears .
 10 LORD JUSTICE FLAUX: Right.
 11 MR EDELMAN: So this poses two questions, the hybrid clause:
 12 firstly , was there a restriction imposed? Does
 13 regulation 6 qualify as a restriction imposed? And,
 14 with respect , you have answered that question yes, and
 15 I don't think that Mr Gaisman objected to that. He
 16 didn't object to that part of the declaration in 17.3.
 17 LORD JUSTICE FLAUX: Well, it's 17.4 --
 18 MR EDELMAN: 17.4, sorry. I'm terribly sorry , I gave the
 19 wrong number .
 20 LORD JUSTICE FLAUX: Even on Mr Gaisman's wording,
 21 regulation 6 is capable of being a restriction imposed.
 22 MR EDELMAN: Yes. So it's capable of being a restriction
 23 imposed. Then he says it didn't impose an inability to
 24 use, and that is just the wrong question. It's then
 25 a question of fact: did that restriction have the

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1 result /cause -- the word "due to" -- an inability to
 2 use?
 3 Now, the court has speculated that cases in which it
 4 did cause an inability to use will be rare , and let's
 5 say that the court is right about that: you cannot shut
 6 out the prospect that that factual causation case can be
 7 made out, and trying to elide the reasoning on different
 8 clauses does not work .
 9 I think if I say any more, I will repeat myself .
 10 I think that's the nub of it . Mr Gaisman spoke at great
 11 length. I'm sure I've not answered all of his very
 12 eloquently made points, but that is at the very heart of
 13 it .
 14 LORD JUSTICE FLAUX: Right, thank you, Mr Edelman.
 15 Mr Lynch, do you want to add anything to that?
 16 Submissions by MR LYNCH
 17 MR LYNCH: My Lord, thank you, only very briefly .
 18 Your Lordships were taken to paragraph 270 by my
 19 learned friend Mr Edelman. That starts:
 20 "But although we considered that there could be
 21 'restrictions imposed' which were not directed
 22 specifically at the insured ..."
 23 Just to add very quickly , the way we get there is
 24 obviously start at 269, and your Lordships find the
 25 start of that process is not being persuaded by Hiscox's

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1 submissions that " restrictions imposed" contemplated by
2 the authority clause necessarily had to be directed to
3 the insured, follows on at 270.

4 Then just very briefly on 17.4(a), so that's
5 {N/11/14}, obviously I note the time and I definitely
6 don't want to do myself out of a drink from Mr Gaisman,
7 but the reason why we've selected the wording we have is
8 because it faithfully follows the judgment. Our
9 opening -- our wording in green, "The words
10 ' restrictions imposed' mean something mandatory as
11 a force of law", etc, up to the end of the brackets, the
12 first sentence, is taken from paragraph 267. There's
13 nothing -- it's simply lifted directly from there. It's
14 as simple as that.

15 "Whether such restrictions caused an inability to
16 used is a question of fact" is from the end of 268.

17 (b), "A ' restriction imposed' does not necessarily
18 have to be directed to the insured or to the insured's
19 use of premises", that is the start of -- sorry, that's
20 the start of 269. And then the reference to social
21 distancing and related action otherwise over the page is
22 the end of 270, about it being the question of fact.

23 So all of this is directly lifted from the judgment.
24 Our submission is -- obviously it's for your Lordships
25 to choose the wording, but that wording is faithful to

1 the judgment, and so I hope that that is suitable
2 wording and there's nothing inappropriate there.

3 Maybe my learned friend Mr Gaisman was confused by
4 the cross-reference to social distancing at 14.5(b), but
5 otherwise nothing to add and we adopt Mr Edelman's
6 submissions, thank you.

7 LORD JUSTICE FLAUX: Right. Thank you. Well, we will
8 retire to our parallel room to consider this matter.
9 (3.48 pm)

(Pause)

11 (3.54 pm)

Ruling

13 LORD JUSTICE FLAUX: Right, taking the points in turn, first
14 of all, whether or not the references in 17.2 and,
15 I think, later on in 18.3 should be to all four forms of
16 Hiscox policy or only Hiscox 1 and 2.

17 Despite the elegant submissions by Mr Gaisman, we
18 consider that we were intending to deal with Hiscox 1 as
19 effectively a lead wording for all Hiscox policies. The
20 fact that there are fewer insuring clauses in 2 and 3
21 doesn't seem to us to answer the point that where you
22 have, as Mr Edelman pointed out, four insuring clauses,
23 one of which cannot make sense if " interruption " means
24 complete cessation, it seems to us to be a compelling
25 answer to Mr Gaisman's point, which we consider we've

1 dealt with in the judgment, and, therefore, we will make
2 the declarations in the form sought by the FCA rather
3 than the form sought by Hiscox.

4 So far as 17.4(a) is concerned, in the fourth line
5 we think we should delete the words in red, "and 6", but
6 otherwise we think that we would propose to make
7 a declaration in terms which include both Mr Gaisman's
8 word " necessarily " and the words "and regulation 6 is
9 capable of being a restriction imposed" in the blue, and
10 also in the red Mr Edelman's words "save for regulation
11 6".

12 We were not particularly impressed by Mr Lynch's
13 suggestion we should adopt a completely different form
14 of words when the FCA and the insurers have essentially
15 agreed the text with those few additions.

16 It seems to us that those additions are entirely
17 appropriate and in accordance with our judgment,
18 particularly the point about regulation 6 being capable
19 of being a restriction imposed.

20 17.4(b) which, in a sense, was the point which took
21 most of the time, it seems to us that that goes further
22 in relation to the hybrid clause, which is what we're
23 dealing with here, the Hiscox hybrid clause, a public
24 authority clause, than paragraphs 266 to 270 in
25 particular of our judgment which are dealing with this

1 clause as opposed to any other Hiscox clause. And
2 although Mr Gaisman very ingeniously as ever referred in
3 his submissions to a number of other provisions which he
4 said you should tie in with what we said in 266 to 270,
5 those, in particular 415 which was dealing with the
6 NDDA clause, are dealing with different clauses in
7 different forms of wording and it doesn't seem to us
8 that it is appropriate to make the cross connection
9 which Mr Gaisman made.

10 It seems to us that Mr Edelman is right that the
11 distinction between the two types of clause is that the
12 NDDA clause is talking about a restriction which itself
13 imposes an inability to use and it's in those
14 circumstances that we reached the conclusion we did in
15 the second half of paragraph 415 of the judgment,
16 whereas the hybrid clause is really looking at whether
17 there is a causal connection between inability to use on
18 the one hand and the restriction imposed on the other.
19 That is an issue of causation, as Mr Edelman pointed
20 out, and it seems to us, therefore, that here one is
21 looking at causation, which is always a question of fact
22 as opposed to construction, and therefore it seems to us
23 that we will not make a declaration in the form of
24 17.4(b) at all.

I think 17.6 is now accepted.

1 Moving on, then, 18.3 we've already dealt with, and
 2 19 we will make the declaration sought in the form
 3 sought by the insurers but, as agreed between the
 4 parties, by deleting the words "an insured is able to
 5 demonstrate" in the first two lines.
 6 I think that's dealt with all the declarations, has
 7 it not, Mr Edelman?
 8 MR EDELMAN: Yes, it has, my Lord, and that deals with the
 9 declarations now in their entirety.
 10 There are some things going on in the background
 11 which I'm not entirely clear about. I just wondered if
 12 it's perhaps best -- we have actually been going for two
 13 hours without a break.
 14 LORD JUSTICE FLAUX: I'm absolutely conscious. If
 15 I'm feeling tired I'm sure a lot of other people are
 16 feeling tired. We may have to go on until 5 o'clock.
 17 That will stop Mr Gaisman from buying Mr Lynch his drink
 18 in some socially distanced public house near the Temple
 19 where only six people can gather, but so be it.
 20 Does going on until 5 o'clock if we have to cause
 21 any difficulties?
 22 MR EDELMAN: Not on my account. I'm sure others will say if
 23 it does.
 24 Substantively, unless there are any issues that
 25 arise, and none arise from my perspective, but unless

1 there are any substantive issues on the certificates or
 2 the permission to appeal to the Court of Appeal, which
 3 I apprehend will be very quick, we only have now left,
 4 although it is substantive, Qatar Insurance Company's
 5 applications.
 6 LORD JUSTICE FLAUX: Yes, and also 11 --
 7 MR EDELMAN: Yes, I'm just trying to see if that's -- the
 8 break would enable me to see -- I can't remember whether
 9 we have had a break. We may have had a break.
 10 LORD JUSTICE FLAUX: If I say 15 minutes, is that sensible?
 11 MR TURNER: Can I just remind your Lordships you wanted to
 12 hear from me on RSA 3 as well, on the general exclusion.
 13 LORD JUSTICE FLAUX: Oh yes.
 14 MR TURNER: It's not going to be a very long point but I do
 15 want to be able to make it.
 16 LORD JUSTICE FLAUX: All right, Mr Turner. Of course you
 17 can make it.
 18 MR GAISMAN: My Lords, can I just go back to 17.6, please.
 19 LORD JUSTICE FLAUX: Yes, sorry, Mr Gaisman, yes.
 20 MR GAISMAN: I'm not quite sure that my Lord,
 21 Lord Justice Flaux -- you said that you thought that was
 22 now accepted. Does that mean that the language which --
 23 LORD JUSTICE FLAUX: Yes, I'm sorry, Mr Gaisman, I shortcut
 24 that one, you're quite right.
 25 17.6 is yet another example where the FCA and the

1 insurers agree another form of wording which seems to us
 2 to be entirely appropriate and the HAG addition is
 3 unnecessary. So we'll make the declaration in the form
 4 in the original black text.
 5 I think that deals with your point, Mr Gaisman? He
 6 has gone.
 7 Okay --
 8 MR GAISMAN: It does. Sorry, my Lord, everything takes
 9 a long time around here. It does, thank you very much.
 10 LORD JUSTICE FLAUX: At least you haven't made a screeching
 11 noise today, anyway.
 12 Well, it's 16.02, so I'll say 4.17; okay?
 13 (4.02 pm)
 14 (A short break)
 15 (4.16 pm)
 16 LORD JUSTICE FLAUX: Are we ready?
 17 MR EDELMAN: I am, my Lord, yes.
 18 I think there are some loose ends on declarations
 19 I just need to tidy up. It will just take a few
 20 minutes.
 21 LORD JUSTICE FLAUX: That sounds like a good idea. Hang on,
 22 Mr Edelman. My window has just blown open.
 23 Yes.
 24 MR EDELMAN: I think unlike the hearing, we haven't missed
 25 any good weather outside.

1 LORD JUSTICE FLAUX: I just had to open the window,
 2 otherwise it becomes -- all the hot air emerging from
 3 the virtual bench makes the room very hot!
 4 Submissions by MR EDELMAN
 5 MR EDELMAN: My Lord, {N/11/6}, can we have that up on
 6 screen, please? Yes, 11, page 6. It's paragraph 11.2.
 7 Perhaps I'll just get on with it without the screen up
 8 if my Lords have it. Ah, here we go.
 9 I think the stage we've reached now is that
 10 Mr Salzedo will not be pursuing the addition of the
 11 words in blue on the basis of a form of wording proposed
 12 by Mr Salzedo which we have agreed. You should have
 13 received by email a new paragraph, 11.3 and obviously
 14 other things -- not to supplant the original one, but
 15 an additional paragraph, hopefully you have received by
 16 email. I think this was the one that you received at
 17 lunchtime or at about 2 o'clock or so {N/11/7}. I'll
 18 read it out:
 19 "[as read] For the avoidance of doubt in respect of
 20 declaration 11.2, the court has not decided and does not
 21 declare whether the correct counterfactual does or does
 22 not retain the existence or effect of or public response
 23 to COVID-19 which was instigated prior to the time when
 24 cover was triggered under the policy but which was not
 25 continued after that time."

1 The only disputed element is we want to add -- if
 2 insurers are getting an additional paragraph about what
 3 the court didn't deal with, bearing in mind what
 4 my Lord, Lord Justice Flaux, said this morning about the
 5 existence or effect of COVID outside the UK, we consider
 6 it's appropriate also to record that. Ordinarily we
 7 wouldn't want declarations about what was and wasn't
 8 considered, but if the insurers are having something in
 9 on this, we don't see why we shouldn't do as well.

10 So that's the only contentious bit. Insurers won't
 11 agree to that. They want their bit about what wasn't
 12 considered but they don't want our bit about what wasn't
 13 considered.

14 Submissions by MR SALZEDO

15 MR SALZEDO: My Lord, there are two problems. One is
 16 Mr Edelman inserted a "not" when reading, which I'm sure
 17 was an innocent error which I'm sure your Lordships will
 18 have spotted.

19 MR EDELMAN: Sorry, that was a slip of the tongue.

20 MR SALZEDO: We will have it without the "not". The more
 21 substantive point is we don't agree about what the
 22 outcome was of this morning's debate about (c), but
 23 what's essentially happened, at the end of a very long
 24 day, is that I raised a point about a certain timing
 25 issue, the one that these words cover, which it seemed

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1 to us was ambiguous in the form of the FCA's
 2 declaration, and your Lordship has put to me in argument
 3 a preliminary view that it hadn't been decided, and
 4 I accepted that, and said that, given that my concern
 5 was that the FCA wording was ambiguous, we should make
 6 it clear that was accepted.

7 There was then a quite separate argument about
 8 a different point about whether the relevant cause was
 9 nationwide or worldwide which was resolved in favour of
 10 the submissions made by Mr Turner that it was to be
 11 UK-wide. One of the grounds on which that was decided
 12 was that it was to make (c) consistent with (a). Then
 13 what's now happened is that my fulfilling my promise to
 14 provide some wording to sort out (a) has led to the FCA
 15 seeking to reverse the result of the debate that we had
 16 this morning, and in my submission that's inappropriate.

17 I can obviously go back over the arguments and make
 18 them more elaborate, but given the time of day,
 19 I'm going to start with the submission that it's too
 20 late.

21 LORD JUSTICE FLAUX: I thought, Mr Salzedo, that we'd
 22 resolved (c) by knocking out "national COVID-19
 23 outbreak" and making it "no COVID-19 in the UK", which
 24 is what's said in (a).

25 MR SALZEDO: Yes, exactly, and we're content with that, but

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1 as I understand it, the FCA is no longer content with
 2 that.

3 LORD JUSTICE FLAUX: Why do we need any more than that
 4 wording --

5 MR EDELMAN: My Lord, just as happened when Mr Salzedo
 6 raised a point about his -- his point and you said that
 7 wasn't within the trial, and Mr Salzedo said: well, then
 8 can I have a declaration that it wasn't, the same thing
 9 happened to me a few -- a paragraph later on the in the
 10 UK point, which is all agreed, that change is agreed,
 11 and you said: but the impact of worldwide wasn't within
 12 the trial. And it's a bit of what's sauce for the goose
 13 is sauce for the gander. If Mr Salzedo and the insurers
 14 want it recorded what wasn't debated by the court, why
 15 shouldn't we as well when the court made that clear this
 16 morning? But that's the sum total of it.

17 LORD JUSTICE FLAUX: Well, we'll just quickly go into our
 18 other room for a moment.

19 MR EDELMAN: I do have the text available, my Lord.

20 LORD JUSTICE FLAUX: It was sent to us by email. Is it the
 21 one that reads:

22 "[as read] For the avoidance of doubt, in respect of
 23 declaration 11.2 the court has not decided and does not
 24 declare whether the correct counterfactual does or does
 25 not retain the existence or effect of public authority

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1 or public response to COVID-19 which was instigated..."
 2 It's that one, is it?

3 MR EDELMAN: Yes, and then (b) is our addition, which is
 4 contested.

5 LORD JUSTICE FLAUX: We've got that, Mr Edelman, and we'll
 6 just discuss it quickly.

7 MR SALZEDO: My Lords, before you rise, can I just say that
 8 if your Lordships are minded to accept Mr Edelman's
 9 submission now that the matter on which, as we
 10 understood it, he lost on UK versus worldwide was not in
 11 the trial, then I do have some submissions to make on
 12 that, my Lords. I have started with a preliminary
 13 point, in the hope of shortcutting this, that it's too
 14 late to go back over that argument.

15 LORD JUSTICE FLAUX: One other possibility is we simply
 16 don't add this in at all and we leave it with 11.2 as is
 17 with the amendment to (c) that we've discussed.

18 MR SALZEDO: Well, as your Lordships know, I made the
 19 submissions earlier that the problem with that was that
 20 (a) does -- there is the potential for someone to
 21 suggest that (a) clearly does include the public
 22 authority responses that were -- that had happened in
 23 that time period before the peril was triggered.

24 LORD JUSTICE FLAUX: Yes, I follow that point.

25 MR SALZEDO: That was the submission I made and we reached

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1 a resolution of that, and it is not satisfactory that
 2 the FCA are now seeking to piggyback on that --
 3 LORD JUSTICE FLAUX: Why don't Mr Justice Butcher and I just
 4 briefly discuss whether we're even prepared to consider
 5 Mr Edelman's additional point, and then we'll know
 6 whether we need to hear more from you.
 7 MR SALZEDO: My Lord.
 8 (4.24 pm)
 9 (Pause)
 10 (4.25 pm)
 11 Ruling
 12 LORD JUSTICE FLAUX: Right, well, we both feel very strongly
 13 that Mr Salzedo's draft addresses the point -- the
 14 specific point that we were concerned about this
 15 morning, on which we could see the force of what he was
 16 saying, and we just think it's quite wrong for the FCA
 17 to seek to now piggyback in an additional point on which
 18 they've effectively lost.
 19 So we will allow Mr Salzedo's 11.3 without the red
 20 amendments. So we don't need to hear any more from you
 21 on that point, Mr Salzedo.
 22 MR SALZEDO: Thank you, my Lord.
 23 LORD JUSTICE FLAUX: Obviously the current 11.3 becoming
 24 11.4, but that can all be dealt with in the final draft.
 25 MR EDELMAN: Yes, absolutely.

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1 LORD JUSTICE FLAUX: Right.
 2 MR EDELMAN: And then one final point which is, I'm pleased
 3 to say, agreed. In 11.3(c), which was our addition,
 4 originally it was our red (d), if we go to {N/11/8} --
 5 LORD JUSTICE FLAUX: Yes.
 6 MR EDELMAN: We've been asked to change the words at the end
 7 "absent the insured peril" to "if the insured peril had
 8 not been triggered" and we have agreed.
 9 LORD JUSTICE FLAUX: Right. Well, you can include that in
 10 the final form of the order.
 11 Submissions by MR EDELMAN
 12 MR EDELMAN: Yes. So that deals -- that does, finally, deal
 13 with declarations, and then we're on to certificates and
 14 the allied topic of permission to appeal to the Court of
 15 Appeal and the extension of time for filing of notice.
 16 Certificates. Hopefully you've seen our application
 17 and all the other parties' applications.
 18 Two points to make by way of preliminary
 19 observation. Firstly, as we understand it,
 20 Ecclesiastical, having seen that we don't appeal the
 21 decision in their favour on the exclusion, have decided
 22 to withdraw -- as I understand it, withdraw their
 23 application for a certificate because there's nothing
 24 for them to appeal in the sense that the favourable
 25 decision against -- for them is not being challenged by

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1 the FCA.
 2 And the second preliminary point is the Hiscox
 3 Action Group want to seek to make an application for
 4 a certificate without being joined as a party.
 5 We have -- if they can satisfy you that they're
 6 entitled to do that, we have no objection to it, but
 7 their alternative application is to be joined and the
 8 FCA would object to that because the FCA is essentially
 9 the claimant and wishes to remain, as such, the sole
 10 claimant and, if necessary, if for any reason the Hiscox
 11 Action Group cannot issue their application for
 12 a certificate without being joined, and are not joined,
 13 then they'll just have to intervene on the appeal.
 14 LORD JUSTICE FLAUX: I was about to say, isn't the short
 15 answer that they intervene on the appeal?
 16 MR EDELMAN: Well, that seems to be --
 17 LORD JUSTICE FLAUX: If their Lordships give permission,
 18 which I would apprehend they will -- although, who
 19 knows, they might not I suppose -- the action group can
 20 make an application to intervene on the basis that they
 21 intervened before the Divisional Court and therefore
 22 they should be entitled to intervene before the Supreme
 23 Court. But ultimately it's a matter for the Supreme
 24 Court, isn't it?
 25 MR EDELMAN: Yes, these are just certificates to give us the

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1 status to apply --
 2 LORD JUSTICE FLAUX: I think Mr Lynch must be right that the
 3 certificate is something that is only granted in respect
 4 of the parties to the proceedings.
 5 MR EDELMAN: Well, that's how it seems to us. Obviously if
 6 HAG have a different take on it they can make
 7 submissions accordingly, but that's how we perceive it.
 8 In fairness, I haven't done the research on it. It's
 9 their lookout in a sense. But the one thing we do
 10 oppose, as we oppose, as you have seen, with QIC, is the
 11 joinder of any additional parties at this stage.
 12 LORD JUSTICE FLAUX: Yes.
 13 MR EDELMAN: The certificates you have seen. I've already
 14 made the submission at the outset about the preferred
 15 form of order. I hope that's not contentious. It's
 16 merely a drafting point. But for completeness, the
 17 orders ought to refer to the grounds of appeal, as
 18 a number of them do, so it's only just --
 19 LORD JUSTICE FLAUX: Well, subject to any point anybody
 20 wants to take about that, I think it seemed to us it's
 21 appropriate that certificates should refer to grounds of
 22 appeal because then everybody knows where they stand and
 23 there's no uncertainty. I don't imagine that's going to
 24 be disputed.
 25 MR EDELMAN: I hope not.

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1 Then permission to appeal to the Court of Appeal.
 2 That's to guard against the possibility of the Supreme
 3 Court refusing permission either on all or some grounds.
 4 As my Lord said, we don't apprehend that happening
 5 because, as far as we're aware, they're ready and
 6 waiting for us to come.
 7 LORD JUSTICE FLAUX: Well, the practice -- or the Supreme
 8 Court rules, I think, or the Practice Direction,
 9 I forget which, provides, doesn't it, that in a case
 10 like this, if they were to refuse permission, then you
 11 can have an extension of time from the court at first
 12 instance for -- until 14 days after the Supreme Court
 13 has dealt with the application for permission to appeal.
 14 MR EDELMAN: And Mr Turner has very helpfully set out
 15 a draft order to that effect in his skeleton at
 16 paragraph 32 {P/8/13}. Just so my Lords can see it,
 17 I'm sure you have read it --
 18 LORD JUSTICE FLAUX: Yes, I can see that.
 19 MR EDELMAN: And that's the form of order which he has
 20 helpfully set out which we would endorse.
 21 So, my Lord, unless there are -- unless any insurers
 22 wish to say anything on the subject, or unless my Lords
 23 have anything to say on the subject, I think the only
 24 issue on this topic, if my Lords are minded to grant
 25 those certificates, was the point that was raised in

1 relation to an aspect of RSA's grounds, on which we make
 2 no comment.
 3 LORD JUSTICE FLAUX: No.
 4 MR KEALEY: My Lord, this is Gavin Kealey. Before RSA
 5 responds, if RSA is going to respond, I just make the
 6 Ecclesiastical's position clear.
 7 My learned friend is absolutely right, given that
 8 the FCA is not appealing the decision in relation to the
 9 Ecclesiastical, the Ecclesiastical is withdrawing its
 10 application, which was prophylactic in the first
 11 instance, for a certificate to go to the Supreme Court.
 12 I should, however, make it clear that the
 13 Ecclesiastical is maintaining its prophylactic
 14 application to the Court of Appeal to cross-appeal as
 15 a matter of precaution at the moment, my Lord. I don't
 16 believe that there is any controversy about that.
 17 Mr Edelman I saw nodding at the appropriate time, and
 18 now shaking his head at the appropriate time, and now
 19 nodding it again at the appropriate time, and therefore
 20 on that basis I shall say no more.
 21 LORD JUSTICE FLAUX: Yes, Mr Kealey. Jolly good, right.
 22 Submissions by MR TURNER
 23 MR TURNER: My Lord, you indicated at the outset of today's
 24 hearing that you would like to hear from me in relation
 25 to RSA 3, and specifically general exclusion L, in the

1 context of the application for permission to appeal to
 2 the Court of Appeal.
 3 This is -- there's no pressure on me in relation to
 4 this particular application because this is a loose
 5 thread which could unravel the entirety of
 6 a consolidated appeal to the Supreme Court if I can't
 7 persuade you. So I'm going to do my best to persuade
 8 you that you should accept that there are proper grounds
 9 to appeal to the Court of Appeal in relation to general
 10 exclusion L.
 11 My Lord, the reason for that is because of the
 12 wrinkle introduced by section 15(3) of the
 13 Administration of Justice Act, which effectively
 14 requires you to be satisfied that the decision that
 15 you're certifying is a decision where there would be
 16 proper grounds to go to the Court of Appeal.
 17 My Lord, just briefly, because you're familiar with
 18 the arguments in relation to this exclusion, and will be
 19 familiar with your Lordship's grounds for holding
 20 against RSA in relation to the exclusion, we say two
 21 things. The first is that there are arguments which
 22 have a reasonable prospect of success and therefore
 23 satisfy the test for an application for permission to
 24 appeal to the Court of Appeal; and, second, that there
 25 are other compelling reasons why you should be willing

1 to grant permission to go to the Court of Appeal.
 2 Can I take the first of those, and really there are
 3 two thematic points that I would make.
 4 The first is the court's finding at paragraph 117 of
 5 its judgment that the exclusion cannot override
 6 an express grant of cover in respect of disease in our
 7 submission begs the question. The argument that could
 8 be advanced to the contrary is that if the insuring
 9 clause and the exclusion are construed alongside each
 10 other, then, we submit, the grant of cover would not
 11 extend at least to an epidemic. That would answer the
 12 problem with which your Lordships grappled in
 13 paragraph 117, and we say that that is an entirely
 14 conventional approach to construction following the
 15 Supreme Court's decision in Impact Funding.
 16 My Lord, the second argument, which is related but
 17 distinct, is that the court's approach to the general
 18 exclusion effectively puts a red line through the
 19 exclusion of epidemic. RSA would submit on appeal, as
 20 it did at first instance, that it is perfectly possible
 21 for an exclusion in respect of epidemic to live
 22 alongside cover for disease and that the court's
 23 approach is, therefore, properly susceptible to
 24 challenge with a reasonable prospect of success, because
 25 the effect of the court's ruling is to ignore the

1 authority or to give inadequate weight to the authority
 2 along the lines that the court should construe the
 3 exclusion with a predisposition to resolving any
 4 potential inconsistency between the terms of cover and
 5 the terms of the exclusion . And, my Lord, that's
 6 Lord Goff's opinion in the Yien Yieh Commercial Bank
 7 case that was cited to you at first instance which has
 8 been applied by the Court of Appeal on at least two
 9 occasions .
 10 We submit that if that approach had been followed ,
 11 then it could and would resolve the potential
 12 inconsistency between the grant of cover on the one hand
 13 and the exclusion on the other .
 14 My Lord, before I move on, could I ask you if you
 15 have available to you Mr Hofmeyr's first skeleton
 16 argument on his application .
 17 LORD JUSTICE FLAUX: Yes, I think so.
 18 MR TURNER: If you have his application bundle then the
 19 reference is tab 4 in his application bundle and it's
 20 pages A31 to A33 and it's paragraph 18(3).
 21 LORD JUSTICE FLAUX: Sorry, Mr Turner. I've got everything
 22 loose. It seemed to be a good idea at the time.
 23 MR TURNER: It's the first skeleton argument that was dated
 24 the 28th.
 25 LORD JUSTICE FLAUX: Paragraph?

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1 MR TURNER: 18. It's towards the end.
 2 LORD JUSTICE FLAUX: Yes.
 3 MR TURNER: And could I just ask you to run your eye over
 4 subparagraph (3)(i)-(v), please.
 5 MR JUSTICE BUTCHER: Is this going to appear on the screen?
 6 MR TURNER: No, I don't think so because I do not believe it
 7 is uploaded to Opus, I'm afraid, my Lord.
 8 LORD JUSTICE FLAUX: We had it yesterday afternoon or
 9 yesterday evening quite late. Well, I've read this
 10 several times previously .
 11 You've muted yourself .
 12 MR TURNER: I hope that's better.
 13 LORD JUSTICE FLAUX: Yes.
 14 MR TURNER: It's been a long day.
 15 LORD JUSTICE FLAUX: It has.
 16 MR TURNER: My Lord, I show that to you because there are
 17 different ways of essentially putting the same points
 18 with different emphasis which you'll have seen is -- you
 19 have muted yourself, my Lord.
 20 LORD JUSTICE FLAUX: Yes, I have. You don't like Mr Hofmeyr
 21 intervening but you're quite happy to adopt his
 22 arguments; that's the point, isn't it?
 23 MR TURNER: Well, no, all I want to do is to show you that
 24 it is an argument that's being advanced by one of the
 25 other insurers . It's relevant for two reasons. The

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1 first is it buttresses my arguments on the merits, and
 2 the second is it leads into my second point which is
 3 other compelling reason as a separate basis for granting
 4 permission to --
 5 LORD JUSTICE FLAUX: That's a separate issue and it did
 6 occur to me, although I was dismissive earlier in the
 7 day, that it might be said, particularly if you're
 8 right, that this could cause sort of procedural
 9 difficulties . That's the last thing we want to happen.
 10 It might be sensible if we just let everything go to the
 11 Supreme Court and if they chuck it out, then there will
 12 have to be -- the Court of Appeal will have to deal with
 13 it on that basis. I can't see the Supreme Court being
 14 sufficiently -- at the stage of permission wanting to go
 15 into the minutiae of each of the different insurers '
 16 arguments.
 17 MR TURNER: Absolutely, my Lord. Really this is just about
 18 making sure that there are no loose ends. If the
 19 Supreme Court were to give permission but we didn't have
 20 permission on general exclusion L because you hadn't
 21 certified it, then RSA would have to make a decision as
 22 to whether it was going to pursue the appeal to the
 23 Supreme Court.
 24 Even if RSA did pursue the appeal to the Supreme
 25 Court and then lost, we know that QEL might still take

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1 the point in meeting its policyholder claims that
 2 general exclusion L has force .
 3 LORD JUSTICE FLAUX: Right.
 4 MR TURNER: So it's much better to get this swept out of the
 5 way and it deals with all of the problems --
 6 LORD JUSTICE FLAUX: Now, in relation to your wordings,
 7 Mr Edey had a point about RSA 4 and the vicinity .
 8 I don't know if that's still pursued in the light of the
 9 indications from the court at the beginning of the day.
 10 MR EDEY: My Lord, the answer to that is, having heard what
 11 your Lordship has said and seen that everybody else is
 12 agreeing to a certificate, we don't press that.
 13 The only point I would make is we shouldn't thereby
 14 be taken to accept that the point on vicinity does stand
 15 a real prospect of success. We say it absolutely
 16 doesn't, but for the practical reasons and for the
 17 reasons which were practical that my Lord identified,
 18 we're not going to continue to oppose a certificate .
 19 LORD JUSTICE FLAUX: Okay. That's very helpful, Mr Edey.
 20 Mr Lynch, do you want to say anything about your
 21 status, as it were, before the Supreme Court?
 22 Submissions by MR LYNCH
 23 MR LYNCH: My Lord, yes, please. I see the time and I will
 24 be as quick as I possibly can.
 25 Obviously I noted earlier the indication given by

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1 my Lord, Lord Justice Flaux, that the indication of the
 2 court was certificates would be given to all parties,
 3 including interveners, and I understand from exchanges
 4 recently that that position may have changed.
 5 Just very briefly, then, in terms of the Hiscox
 6 interveners having standing to make the application
 7 independently, if we please go to {S/1/1} we see the
 8 Administration of Justice Act 1969.
 9 LORD JUSTICE FLAUX: S?
 10 MR LYNCH: {S/1}, please. I don't know if my Lords have
 11 that in some other form. I'll read it out just to speed
 12 things up. So it's section 12:
 13 "Where on the application of any of the parties to
 14 any proceedings ..."
 15 Thank you.
 16 LORD JUSTICE FLAUX: There we are.
 17 MR LYNCH: So the first point to make is, looking at this,
 18 this wording:
 19 "Where on the application of any of the parties to
 20 any proceedings to which this section applies the judge
 21 is satisfied ..."
 22 Et cetera. There's no definition of parties. It's
 23 not limited in any way. It's simply "parties to any
 24 proceedings to which this section applies". The
 25 interveners have obviously taken part as intervening

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1 parties in these proceedings. There's a very good
 2 reason for it to be broad because what this is not is
 3 permission to appeal. This is a form of certificate
 4 saying it's suitable for the Supreme Court to consider.
 5 LORD JUSTICE FLAUX: Well, it does, at least, if we grant
 6 you a certificate -- I don't think Mr Edey is seeking
 7 a certificate, I'm not sure.
 8 MR LYNCH: No, I believe not.
 9 LORD JUSTICE FLAUX: It's just you, isn't it? If we grant
 10 you a certificate, that still leaves open the issue of
 11 whether the Supreme Court gives permission to appeal or
 12 whether they choose to deal with it in some other way.
 13 MR LYNCH: Absolutely.
 14 LORD JUSTICE FLAUX: We'll discuss it in a moment,
 15 Mr Justice Butcher and I will discuss it, but I see the
 16 force of the point. There's no definition of parties to
 17 proceedings. It seems -- in the context of the way in
 18 which the case has proceeded, it seems to be unduly
 19 cumbersome to require you to be joined under part
 20 19.3(b) or whatever it is.
 21 MR LYNCH: My Lord, absolutely. I don't think there will be
 22 any debate, and there's certainly clearly established
 23 authority, we do have standing to go to the Court of
 24 Appeal. It would be an oddity if we had that standing
 25 but we don't have standing if the court feels it's

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1 suitable for a certificate to leapfrog --
 2 LORD JUSTICE FLAUX: It would be very odd, wouldn't it?
 3 MR LYNCH: It would be odd. I have many other points.
 4 LORD JUSTICE FLAUX: That's as good a point as any.
 5 MR LYNCH: Thank you.
 6 LORD JUSTICE FLAUX: Mr Edey, is there something you want to
 7 say?
 8 MR EDEY: My Lord we haven't applied for a certificate
 9 because the FCA has and we intend to continue as
 10 interveners in the Supreme Court, subject to the Supreme
 11 Court being content for us to do so. But we have
 12 your Lordship's indication, I think, that you would not
 13 think that that was an unwise thing for us to seek to
 14 do.
 15 LORD JUSTICE FLAUX: Okay. Well, I think Mr Justice Butcher
 16 and I will just retire briefly to consider Mr Turner's
 17 point on this point and then we can hear from
 18 Mr Hofmeyr.
 19 (4.46 pm)
 20 (Pause)
 21 (4.47 pm)
 22 Ruling
 23 LORD JUSTICE FLAUX: Right. Well, Mr Turner, whilst we
 24 still don't think that much of the point, we do follow
 25 your concern about creating a sort of procedural mishap,

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1 which we would not want to do. So even if it is that
 2 there is some other compelling reason for permission to
 3 be given to go to the Court of Appeal on general
 4 exclusion L, we would have given permission to appeal on
 5 that point as well as on everything else. So I think
 6 that avoids that particular potential difficulty.
 7 MR TURNER: Thank you, my Lord.
 8 LORD JUSTICE FLAUX: So far as Mr Lynch is concerned, we
 9 think that we should grant him the certificate. What
 10 happens when it gets to the Supreme Court is a matter
 11 for them and not for us. All right?
 12 MR LYNCH: My Lord, I'm grateful.
 13 Submissions by MR KEALEY
 14 MR KEALEY: My Lord, I'm sorry to squeeze Mr Hofmeyr and
 15 Ms Sabben-Clare unduly. There's just one point --
 16 actually it gives me great delight to squeeze Mr Hofmeyr
 17 and Ms Sabben-Clare, but anyway, putting that to one
 18 side, there's a --
 19 LORD JUSTICE FLAUX: As politically correct as ever,
 20 Mr Kealey.
 21 MR KEALEY: There's a formal point on the order. If one
 22 looks, as it happens, at section 12 of the
 23 Administration of Justice Act, which is at bundle
 24 {S/1/1}.
 25 LORD JUSTICE FLAUX: We've got it.

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1 MR KEALEY: What one finds is that your Lordship's
 2 certificate is to the effect -- that is in section 12.
 3 It says "where on the application of any" --
 4 LORD JUSTICE FLAUX: Hang on a moment, Mr Kealey, the person
 5 dealing with this has put up something different .
 6 Sorry, Mr Kealey, yes.
 7 MR KEALEY: No, it's my fault. I've just got it in hard
 8 copy:
 9 "Where on the application of any of the parties ...
 10 the judge is satisfied ..."
 11 And it is:
 12 "The conditions in subsection (3A) ('the alternative
 13 conditions') are satisfied in relation to those
 14 proceedings, and that a sufficient case for an appeal
 15 ... under this Part of the Act has been made out to
 16 justify an application for leave to bring such an appeal
 17 ... the judge ... may grant a certificate to that
 18 effect."
 19 And if your Lordships could look at 3(a), the
 20 alternative conditions are that a point of law of
 21 general public importance is involved in the decision
 22 and that the proceedings entail a decision relating to
 23 a matter of national importance or consideration of such
 24 a matter, etc, and if your Lordships look at (b):
 25 "the result of the proceedings is so significant ..."

1 Then if your Lordships look at section 13, it says
 2 there in (i) --
 3 LORD JUSTICE FLAUX: Can we have the next page, please?
 4 MR KEALEY: I'm so sorry, my Lord, it's {S/1/3}:
 5 "Where in any proceedings the judge grants
 6 a certificate ... then, at any time within one month from
 7 the date on which that certificate is granted ... any of
 8 the parties to the proceedings may make an application
 9 to the Supreme Court under this section."
 10 My Lord, if you could turn to bundle O, and you look
 11 at divider 6 at page 1 {O/6/1}, you will see in fact our
 12 draft order makes the mistake of not following this
 13 draft, which is Arch's draft.
 14 The order that is made or proposed to be made by
 15 Arch in our respectful submission is the correct order
 16 and the grounds are actually properly to be set out in
 17 the application to the Supreme Court. Of course that is
 18 sensible in this court because your Lordships have been
 19 fiddling with declarations all day and the grounds which
 20 have been put into draft form by many parties, including
 21 my own clients, some of them are going to be slightly
 22 modified as a result of what's been done today. Not
 23 vastly, but slightly .
 24 Therefore, what I would suggest to your Lordships is
 25 that the proposed order to make is not for the parties

1 to set out the grounds, but rather the order proposed by
 2 Arch should be the order that your Lordships make and
 3 then we, the parties, should set out the grounds of
 4 appeal for consideration by the Supreme Court in our
 5 application to the Supreme Court.
 6 That, as I understand it, is the way forward, rather
 7 than the way in which has been proposed, and I'm as much
 8 at fault as anybody else for not appreciating that.
 9 LORD JUSTICE FLAUX: Does Mr Edelman want to say anything
 10 about that? That would seem to follow from the wording
 11 of the statute, Mr Edelman.
 12 MR EDELMAN: My only concern was to get some certainty.
 13 LORD JUSTICE FLAUX: You will get the certainty, I suppose,
 14 because the applications set out the grounds and the
 15 grounds will presumably be as set out in the
 16 applications which we already have.
 17 MR EDELMAN: It may be that what one can have is
 18 an additional recital and upon the court considering the
 19 grounds of appeal appended to the applications .
 20 LORD JUSTICE FLAUX: Yes, that would cover it, I think.
 21 That wouldn't give rise to a statutory objection,
 22 Mr Kealey.
 23 MR KEALEY: No, no, that's absolutely right. I think it
 24 should be the draft grounds of appeal.
 25 MR EDELMAN: Yes, yes, quite, that's fine. As long as

1 everybody has a reference point.
 2 MR KEALEY: I'm so sorry to have detained everybody.
 3 LORD JUSTICE FLAUX: No, not at all, that's very helpful.
 4 I would hate to get the order wrong.
 5 Okay. So we would -- I haven't sort of recited
 6 seriatim compliance with section 12 of the Act, but just
 7 for the avoidance of doubt, as I'm sure you appreciate,
 8 we are both satisfied that in fact all the conditions in
 9 section 12(3)(a) are satisfied in this case, so that it
 10 is entirely appropriate that the certificate should be
 11 granted, and the order will reflect that as drafted in
 12 this particular version.
 13 I think that covers everything to date and that
 14 leaves only Mr Hofmeyr's explanation, and I'm very
 15 sorry, Mr Hofmeyr, that you have been left so late in
 16 the day.
 17 Submissions by MR HOFMEYR
 18 MR HOFMEYR: May it please your Lordships, I'm the driver of
 19 the van outside carrying what the court has described as
 20 "a load of rubbish".
 21 LORD JUSTICE FLAUX: Don't worry about the substance of your
 22 points. I think the issues are twofold, as we see it.
 23 One is why you didn't make an application to intervene
 24 in accordance with the case management order that the
 25 court made which required applications to intervene to

1 be made by a date in June; and secondly, why it's
 2 necessary for you to continue with this application
 3 given that RSA have indicated they intend to appeal.
 4 MR HOFMEYR: Yes, thank you. Let me answer those questions.
 5 We are still here, despite RSA having filed
 6 an application for permission to appeal, because there
 7 remains a real problem about the case proceeding without
 8 QEL's participation. This is because, first, there
 9 needs to be an appeal on RSA 3, and second, it still
 10 appears that there may very well not be an appeal on RSA
 11 3 if QEL is not permitted to intervene.
 12 Starting for the need for an appeal on RSA 3, first,
 13 as explained in our skeleton and QEL's application, if
 14 the court's findings on the RSA 3 wording are not
 15 appealed, there will be acute practical difficulties and
 16 insurers on this wording will be put into a most
 17 invidious position.
 18 On the one hand they consider that the court's
 19 decision on this wording was wrong. On the other, their
 20 regulator has said in its "Dear CEO" letter, that it
 21 expects insurers to pay in accordance with the judgment
 22 unless there is an appeal.
 23 Second, the FCA's response in its skeleton argument
 24 is that QEL can commence fresh proceedings if it
 25 considers that the judgment was wrong. This is no

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1 answer at all. The FCA's skeleton position is directly
 2 contrary to the position that it has adopted as
 3 regulator in its communication with CEOs.
 4 The FCA has said that it expects all insurers to pay
 5 claims promptly, in accordance with the judgment, unless
 6 there is an appeal. Is it withdrawing that position?
 7 It certainly has not said so in any public
 8 pronouncement. It's most surprising for a regulator to
 9 be saying that the right course of action for an insurer
 10 is to ignore the guidance that it has given.
 11 The whole point of the test case was to avoid
 12 multiple actions and the delay for policyholders that
 13 they entail. Neither the court nor the FCA should be
 14 countenancing fresh proceedings. Indeed, it's rather
 15 remarkable to see the FCA suggesting that this is the
 16 appropriate course. QEL's policyholders are, in effect,
 17 being abandoned by the FCA and left to their own
 18 devices.
 19 Third, a great deal of money turns on the effect of
 20 the RSA 3 wording. QEL estimates its own exposure at
 21 114 million and that of all insurers on the wording as
 22 750 million. That's in the evidence.
 23 Bear in mind that the FCA told the court by
 24 Mr Brewis' witness statement of 9 June 2020 that the
 25 value of total claims then made across all policies were

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1 estimated as 1.2 billion. A lot rides on RSA 3. RSA 3
 2 wording represents a big proportion of insurers'
 3 collective exposure. The amount of money at stake
 4 reinforces the point that the concerns raised by QEL
 5 about the judgment on this issue are not going to go
 6 away. Frankly, unless there is an appeal in this case,
 7 there is bound to be more litigation.
 8 So that's the first point that we make. There needs
 9 to be an appeal on RSA 3.
 10 Turning to the risk that there will be no appeal
 11 unless QEL is allowed to intervene, let me make the
 12 following points.
 13 The application was made because QEL anticipated
 14 that RSA was not going to appeal. The conversations
 15 which led to that expectation was subject to common
 16 interest privilege and so no more can be said about the
 17 basis for this. But what the court can and should take
 18 from the evidence before the court of that expectation
 19 formed by QEL is that the RSA's attitude is probably not
 20 a fight-them-on-the-beaches one that an appeal must
 21 proceed in all circumstances.
 22 Second, QEL has asked RSA for clarification. RSA
 23 replied in a letter from DWF dated 30 September, that's
 24 Wednesday, in which they stated that RSA intends to
 25 pursue an appeal "in the current circumstances", but

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1 that it "continues to engage" with the FCA and other
 2 insurers.
 3 This confirms --
 4 MR JUSTICE BUTCHER: Your position, Mr Hofmeyr, is that you
 5 will fight on the beaches?
 6 MR HOFMEYR: That is our position, yes.
 7 LORD JUSTICE FLAUX: But, Mr Hofmeyr, if Mr Turner doesn't
 8 appeal --
 9 MR HOFMEYR: Yes.
 10 LORD JUSTICE FLAUX: -- then you can seek to intervene
 11 before the Supreme Court?
 12 MR HOFMEYR: We can seek to intervene before the Supreme
 13 Court, but we would have to do so -- we don't know --
 14 the real problem is the matter of uncertainty. We don't
 15 know when that withdrawal will take place. It might
 16 take place at the door of the court.
 17 LORD JUSTICE FLAUX: Well, it might do. You're presumably
 18 prepared to argue the point.
 19 MR JUSTICE BUTCHER: It's not a very long point, is it,
 20 Mr Hofmeyr?
 21 MR HOFMEYR: No, it's not a long point. That's absolutely
 22 right.
 23 LORD JUSTICE FLAUX: And in any event, Mr Hofmeyr, because
 24 we took RSA 3 as effectively the specimen wording for
 25 the disease clauses, much of the argument about RSA 3 is

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1 going to be ventilated before the Supreme Court by the
 2 other insurers in any event, isn't it?
 3 MR HOFMEYR: That is correct.
 4 LORD JUSTICE FLAUX: What I might describe as the radius
 5 point is going to be ventilated by all the insurers who
 6 have got those sorts of clauses?
 7 MR HOFMEYR: That is absolutely correct, but it's not going
 8 to be considered unless RSA appeals by reference to the
 9 specific RSA 3 wording, including the exclusion, which
 10 on the court's current decision is nugatory. It means
 11 that a red line must be drawn through the word
 12 "epidemic", "pandemic", and in the circumstances that
 13 all the arguments in relation to repugnancy are alive.
 14 So we say that the position -- there is still a risk
 15 that no appeal will be made unless we are permitted to
 16 intervene and that it's no answer to that, as the FCA
 17 suggest, that we must simply start declaratory
 18 proceedings against policyholders.
 19 There is a further risk and that is that there may
 20 be no action in which to intervene. In its press
 21 release published on 30 September the FCA repeated its
 22 oft-stated intention to continue discussions with
 23 insurers and action groups in order to find a solution
 24 which resolves outstanding issues as soon as possible to
 25 enable payouts on eligible claims.

1 Now, this, of course, is a commendable aim. The
 2 intention is that the discussions will continue, and
 3 I quote, "in the coming weeks", and the hope is that the
 4 appeal will be rendered unnecessary. There is,
 5 therefore, a significant risk that the issues in this
 6 action will be compromised and the action discontinued
 7 without notice to non-participants.
 8 LORD JUSTICE FLAUX: Well, your client should have thought
 9 of that problem when they decided that they wouldn't
 10 intervene in the first place. That was always a risk.
 11 There was always a risk from day one that this action
 12 would be settled either before judgment or, more likely,
 13 after judgment in the light of the judgment, and you had
 14 the opportunity, as did any other insurer who wanted to,
 15 to join to run any separate arguments you wanted to run
 16 if you didn't think that Mr Turner could do the job
 17 properly, which appears to be what underlies this
 18 application.
 19 MR HOFMEYR: There are two points in response to that. The
 20 first is my clients made their decision not to intervene
 21 at the time they did in the light of the information
 22 which was available. If it were appropriate for
 23 insurers to have applied to intervene merely because
 24 there was a concern about a settlement by those in the
 25 action, then everybody would have had to apply on that

1 basis.
 2 So we made a decision at the time based on the
 3 circumstances existing at the time. Those circumstances
 4 have changed.
 5 MR JUSTICE BUTCHER: The only circumstance you're relying on
 6 there was that RSA was fighting the action.
 7 MR HOFMEYR: That RSA was fighting the action and that it
 8 was unlikely that a party in the position of QEL would
 9 have been permitted to intervene in the action. That
 10 was the view that was taken and it was anticipated that
 11 the points which needed to be argued would all have been
 12 argued fully and completely.
 13 The difference between the RSA and the QEL is that,
 14 so far as the RSA is concerned, they have a number of
 15 fronts on which they are arguing, and their reasons for
 16 potentially settling may be a give-and-take in relation
 17 to different policies. That's not true in relation to
 18 QEL who have written on RSA 3 wording --
 19 LORD JUSTICE FLAUX: That, with respect, is a very similar
 20 argument to the argument that was made by both the
 21 interveners whom we did permit to intervene, albeit not
 22 in the context of the insurers, but in the context of
 23 the FCA, that the FCA had, as it were, its own interests
 24 and it would not necessarily put all the policyholders'
 25 points in the forceful way in which the policyholders

1 wanted to put the points, because the FCA had, you know,
 2 a number of different hats and a number of different
 3 roles and therefore it was appropriate that other
 4 people, in this instance representatives of the
 5 policyholders, were permitted to intervene.
 6 If your client insurers or any other insurers who
 7 were involved with these wordings had come to the court
 8 at the time when we said any intervention must be made
 9 and had made the points that you now make about the
 10 potential that RSA might end up settling for market
 11 reasons, it seems to me, speaking for myself, we might
 12 very well have permitted intervention.
 13 MR HOFMEYR: With respect, my Lord, that argument would have
 14 been true in relation to most of the non-participant
 15 insurers.
 16 LORD JUSTICE FLAUX: That's as may be, Mr Hofmeyr.
 17 MR HOFMEYR: And a sensible decision had to be made, and we
 18 consider the decision we made was a sensible one at the
 19 time. The court was not -- did not have an additional
 20 party as a consequence. However, there is now a risk
 21 that, for commercial reasons, the argument that we wish
 22 to advance will not proceed on appeal and we wish to
 23 protect our client's position in those circumstances.
 24 LORD JUSTICE FLAUX: Well, Mr Hofmeyr, it would have been
 25 open to all the insurers -- I don't know what

1 arrangements have been made behind the scenes. It may
 2 be that some of the insurers in relation to some of
 3 these wordings had agreements with the FCA that they
 4 would agree to be bound by particular wordings.
 5 We know, I think, that certainly one of the major
 6 British insurers writes business on the RSA 4 form. We
 7 were told that during the course of the hearing. They
 8 have not sought to intervene at any stage and it may be
 9 that that's because they have agreed to be bound by the
 10 result in relation to RSA 4.
 11 Those insurers like your client who were not
 12 prepared to be bound by whatever the result was had the
 13 option to intervene or, even earlier than that, to
 14 invite the FCA to include them as one of the insurers in
 15 the test case.
 16 In one sense it doesn't matter whether there were
 17 eight of you or 15 of you: we would not have permitted,
 18 as it were, three people to run the same argument, but
 19 to the extent you had different points that weren't
 20 being run by the RSA, we would have permitted you to run
 21 them.
 22 MR HOFMEYR: With respect, my Lord, we didn't know before
 23 the action started what points would be run by the RSA
 24 and in what way.
 25 We do know that now, and we didn't clutter up the

1 procedure by seeking to become involved at the first
 2 stage, but these -- there are very significant sums of
 3 money at stake, and the circumstances now are entirely
 4 different to those which prevailed before the action
 5 commenced, and we submit that the just way of achieving
 6 certainty for the policyholders is to permit us to
 7 intervene to ensure that this matter is appealed in this
 8 action and that we are not forced to bring declaratory
 9 proceedings against a multitude of policyholders in
 10 other actions in the future.
 11 LORD JUSTICE FLAUX: Right. Okay. Thank you.
 12 MR HOFMEYR: Unless I can assist your Lordships further,
 13 those are my submissions.
 14 LORD JUSTICE FLAUX: No, that's very helpful. Thank you,
 15 Mr Hofmeyr.
 16 Now, Mr Edelman --
 17 Submissions by MR EDELMAN
 18 MR EDELMAN: Yes, my Lord. Well, we obviously oppose this
 19 very vigorously. I needn't go through the history of
 20 the procedure, because my Lords obviously have it in
 21 mind, about the steps that were taken by the FCA, not
 22 only to assemble insurers to participate in this test
 23 case, but also to publicise it and to publicise the
 24 orders that were being made, so that everybody knew that
 25 there was a deadline of 24 June 2020 for applications

1 for intervention returnable at the second CMC, and that
 2 resulted, as my Lord has already observed, in two
 3 policyholder groups intervening. Some insurers almost
 4 applied to intervene, but in the end decided not to
 5 apply. So QEL had that opportunity.
 6 From the FCA's perspective, they have chosen who to
 7 litigate with. They've chosen the eight insurers to
 8 litigate with. They could have been forced to litigate
 9 with others if they'd applied to intervene. They
 10 haven't, and now QEL wants to foist themselves on to the
 11 FCA to litigate with them to cover the eventuality that
 12 the FCA might reach an agreement with an insurer that
 13 the FCA did choose to litigate with. So this is, we
 14 submit, completely farfetched.
 15 I would also add --
 16 LORD JUSTICE FLAUX: What Mr Gaisman has described in
 17 a different context as the tail wagging the dog.
 18 MR EDELMAN: Yes, and I would also add that there has not
 19 been one hint of an offer to enter into the framework
 20 agreement.
 21 LORD JUSTICE FLAUX: No.
 22 MR EDELMAN: And that, as my Lords have seen over the
 23 period, has a number of mutual obligations. There are
 24 mutual objectives that are set there which are mutual
 25 objectives which are in the interests both of the

1 policyholders and the insurance industry to achieve
 2 an expeditious inclusion and certainty, and if that is
 3 by achieving a settlement as a result of this judgment,
 4 so be it. That's consistent with the framework
 5 agreement and that's what the parties signed up to. Not
 6 that they signed up to settling; they signed up to
 7 working together cooperatively to try and create
 8 a situation in which those claims which could or should
 9 be paid, were paid, and if claims were not to be paid,
 10 at least everybody understood why they were not being
 11 paid and not due to be paid.
 12 Added to which this application is not even
 13 compliant with the court rules. It should have been
 14 served on the FCA. The procedure that appears to have
 15 been adopted is one for the substitution of parties,
 16 which is permitted under rule 19.2.4. But
 17 Practice Direction 19 says that unless it's for
 18 substitution it has to be served in accordance with rule
 19 23, and it hasn't been served on the FCA. The FCA
 20 discovered this when it was going through the file. It
 21 was not served on the FCA and it should have been served
 22 three days before the hearing date.
 23 That ties in -- it also ties in with the framework
 24 agreement point, because if we'd been served with it we
 25 could have actually raised a point with them about the

1 framework agreement.
 2 They are also actually even too late to apply for
 3 a certificate . I'm grateful to Mr Turner for drawing
 4 this to my attention because, as my Lords know, because
 5 of the time limit , section 12(4) provides that the
 6 application for a certificate has to be made to a judge
 7 immediately after he gives judgment or provide that the
 8 judge may in a particular case entertain such
 9 application at any later time before the end of the
 10 period of 14 days, beginning with the date on which
 11 judgment is given. And that has passed, so they can't
 12 even issue an application of their own for
 13 a certificate . So that's a problem.
 14 Can I just mention two other points. Firstly it's
 15 said, and this is important to put on the record , that
 16 somehow the regulator, the FCA, is abandoning
 17 policyholders to their fate.
 18 The regulator will take regulatory action in
 19 response to this judgment if and to the extent that it's
 20 not appealed, and, if it is appealed, in accordance with
 21 the outcome of that appeal, on the basis that these test
 22 cases were run with a selected number of insurers and no
 23 other insurers asked to intervene in the action, and on
 24 that basis the FCA considers it will be entitled to
 25 pursue regulatory action by reference to this test case

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1 judgment, and there's nothing untoward about that in
 2 circumstances where this was a very well publicised
 3 piece of litigation . It's different if there was
 4 a private piece of litigation which someone didn't know
 5 about and then suddenly the FCA says: we're taking
 6 regulatory action to give effect to this judgment which
 7 nobody else knew about.
 8 LORD JUSTICE FLAUX: The whole point of this test case
 9 procedure and the framework agreement under which it was
 10 adopted was that the result of this case, whether before
 11 us or in the Supreme Court, would effectively bind the
 12 insurers in the market, not formally necessarily , but
 13 that it would do so in terms of your client's position
 14 as the regulator for precisely the reason that if other
 15 insurers wanted to intervene , they could and should have
 16 done.
 17 MR EDELMAN: Absolutely. And, of course, one would have to
 18 be blind -- sorry , I shouldn't use that word. One would
 19 have to be ignorant not to realise that one of the
 20 outcomes of the judgment might be that everybody would
 21 sit down and try and work out whether they needed to
 22 appeal or whether they could live with the judgment and
 23 try and find a suitable way forward. Because one of the
 24 avowed aims of the FCA was to achieve certainty and
 25 payment of those claims which should be paid as quickly

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1 as possible , and that certainty was for the benefit of
 2 insurers as well .
 3 So the whole context of this was to try and achieve
 4 a rapid solution , which the court has bent over
 5 backwards to help us to achieve, and this is an attempt
 6 to undo it.
 7 The final point I want to make is we simply do not
 8 recognise the figures that QEL have given. Insurers
 9 were invited to provide to the FCA their estimate of the
 10 value of claims that had actually been made against
 11 them. And I don't want -- I won't reveal the figure ,
 12 but all I can say is that it was a small fraction of the
 13 figure that has been quoted by QEL -- both figures , both
 14 their figure and the maximum -- which we assume is
 15 simply calculated by taking all their policies that
 16 they've issued to all policyholders , and multiplying the
 17 limits of indemnity by the number of policies they've
 18 issued, as opposed to actually calculating , as it were,
 19 a reserve figure for the claims that have been made,
 20 which is presumably the figure that they've actually
 21 provided to the FCA. Because we got those figures from
 22 all insurers , just so that we could understand who was
 23 exposed where, which helped with the selection of the
 24 insurers , and that may be why they were so far down the
 25 pecking order given what we knew about the level of

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1 claims made against them to which they were exposed.
 2 LORD JUSTICE FLAUX: Well, we've seen figures in the press,
 3 as it were.
 4 MR EDELMAN: Yes, but that's for the entire industry .
 5 LORD JUSTICE FLAUX: We've seen figures in the press for
 6 some of the other insurers' exposures, and I'm not going
 7 to name them, but I think we all know some of the
 8 insurers have indicated that position , and that is
 9 inconsistent with this sort of level of exposure, isn't
 10 it?
 11 MR EDELMAN: Yes, I mean, this is a maximum loss exposure --
 12 LORD JUSTICE FLAUX: QEL is not, as it were, one of the five
 13 major players in the market?
 14 MR EDELMAN: No. I will confess I'd never heard of them.
 15 And I think I've been doing -- we've all been doing --
 16 LORD JUSTICE FLAUX: I had never heard of them but I'm ...
 17 you know, I don't do as much insurance work these days
 18 as you do, Mr Edelman.
 19 MR EDELMAN: No, well I've never heard of them. I mean,
 20 they're based in Malta, which may say something. But
 21 there we go.
 22 LORD JUSTICE FLAUX: Okay. Right. Well, I think Mr Turner
 23 probably has some submissions to make as well.
 24 Submissions by MR TURNER
 25 MR TURNER: My Lord, very briefly, I'm not going to go over

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1 the ground in my skeleton argument filed yesterday
 2 afternoon, which I hope has been read. If it hasn't, it
 3 hasn't.
 4 LORD JUSTICE FLAUX: We've read it.
 5 MR TURNER: Can I just deal with one point, which was
 6 Mr Hofmeyr's complaint that QEL did not know what points
 7 would be run by RSA and in what order.
 8 Could I ask for {F/1/6} to go on the screen please,
 9 which is from the framework agreement, and could I ask
 10 you to look at paragraph 2.5, which deals with the fact
 11 that both the FCA and the insurers were mindful that
 12 they would be acting effectively in a broadly
 13 representative capacity, the FCA on behalf of
 14 policyholders --
 15 MR JUSTICE BUTCHER: I'm sorry, Mr Turner, what is this?
 16 MR TURNER: This is from the framework agreement, so this is
 17 what all the defendant insurers signed up to but which
 18 QEL has not signed up to. But this was a public
 19 document which one assumes that QEL read at the time.
 20 Paragraph 2.5 specifically caters for both the FCA
 21 to engage under a cloak of common interest privilege
 22 with policyholders, and for the defendant insurers to
 23 engage with others in the market who may have
 24 an interest in the proceedings. So, for example, in
 25 2.5:

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1 "It is recognised ..."
 2 Four lines up from the bottom:
 3 "... that the Insurers may wish to share privileged
 4 information with each other (and with other insurers and
 5 reinsurers) on a confidential (and/or common-interest)
 6 basis and the FCA agrees not to challenge the
 7 application of such privilege."
 8 Now, my Lord, I'm not going to start waiving
 9 privilege, but you will recall an allusion during the
 10 course of my oral submissions as to how well subscribed
 11 the 52-seater coach for RSA 4 was, and all I can say,
 12 without waiving privilege, is that Mr Hofmeyr's
 13 complaint might carry a little bit more weight if QEL
 14 had made any contact with RSA about these proceedings
 15 before 5.32 pm three days ago, Tuesday this week.
 16 My Lord, that's all I have to say.
 17 LORD JUSTICE FLAUX: Thank you, Mr Turner.
 18 Mr Hofmeyr, any reply?
 19 Submissions in reply by MR HOFMEYR
 20 MR HOFMEYR: Thank you, my Lord.
 21 The real concern which we invite the court to have
 22 regard to is the risk of settlement now. That is the
 23 matter which creates the greatest concern, and in that
 24 context Mr Edelman made points in relation to what the
 25 regulator may or may not do. Those submissions need to

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1 be weighed alongside what he himself said in his
 2 skeleton argument as to what the appropriate course
 3 would be for QEL going forward. He has said it clearly
 4 in his skeleton argument. It's there for all to read.
 5 Further, on the FCA's website it is stated clearly
 6 that the judgment is legally binding on parties and
 7 persuasive guidance for the interpretation of policy
 8 wordings and clauses for others. It doesn't have any
 9 greater status than that, and the FCA has always
 10 recognised that certain insurers, if the matter were not
 11 appealed, would take the matter further themselves.
 12 On the technical points, my Lord, all I can do is
 13 tell you that the application was served formally, in
 14 accordance with the rules, on the FCA on Wednesday, and
 15 the section 12 certificate application was served in
 16 time on Monday, albeit of course we were not at the time
 17 parties. So those are points with no weight to them at
 18 all.
 19 LORD JUSTICE FLAUX: Right.
 20 MR HOFMEYR: So far as cooperation is concerned, I can tell
 21 you on instructions that my clients would be willing, if
 22 they were permitted to join the proceedings, to sign up
 23 to the framework agreement.
 24 Our application is in an attempt to uphold the
 25 process rather than to undermine it, but if we are

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1 forced by a settlement to take proceedings hereafter,
 2 that will be completely contrary to the ethos of the
 3 framework agreement and the ethos of these proceedings,
 4 and we're seeking to uphold those by our action rather
 5 than to undermine them.
 6 So far as the timing of our application was
 7 concerned, again I can't go into the details in relation
 8 to the common interest privilege, but I can say that it
 9 was only on Sunday night that we were given the very
 10 clear indication that RSA were not going to appeal, and
 11 our application was made in hurried circumstances in
 12 response to that clear information.
 13 That QEL had an opportunity to intervene at an early
 14 stage is, of course, a factor which the court must take
 15 into consideration, but it is not a decisive factor. If
 16 the circumstances change, and we say they have changed,
 17 the application to join must be considered at the time
 18 on its merits, and we submit that our application has
 19 merit, that it will not complicate the proceedings in
 20 any shape or form. The Appeal Court, in this case the
 21 Supreme Court or the Court of Appeal, will be able to
 22 regulate what submissions are made and when. So it will
 23 not complicate. All it will do will, in fact, uphold
 24 the process which has been begun and prevent any future
 25 undermining of the process.

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1 Unless I can assist your Lordships further, those
2 are my submissions in reply.

3 LORD JUSTICE FLAUX: No, thank you very much, Mr Hofmeyr.

4 The court will retire to our parallel hearing room.
5 (5.28 pm)

6 (Pause)

7 (5.31 pm)

8 Ruling

9 LORD JUSTICE FLAUX: Right, the court has finally to deal
10 with an application by QEL, represented by Mr Stephen
11 Hofmeyr QC, to intervene in these proceedings,
12 an application that was made on Wednesday of this week,
13 that is to say, Wednesday, 30 September, 15 days after
14 judgment was published.

15 We consider that this application is one to which we
16 should not accede for a number of reasons.

17 Firstly, it seems to us, despite Mr Hofmeyr's
18 arguments to the contrary, that QEL could and should
19 have sought to intervene by the deadline imposed
20 pursuant to the case management decisions of the court
21 and the parties to the proceedings, namely that any
22 applications to intervene should be made by 26 June so
23 that they could be dealt with at the second case
24 management conference, as, indeed, we did deal with the
25 applications to intervene by HIGA and HAG.

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1 These proceedings were very public proceedings. The
2 FCA website identified the nature of the proceedings,
3 and it seems to us that QEL must have appreciated at
4 that time that one of the possible consequences of the
5 spirit of cooperation which has run through these
6 proceedings throughout as a consequence of the framework
7 agreement was that either before judgment, or possibly
8 more likely after judgment, there would be a settlement
9 of the proceedings, and given that that was always in
10 prospect, it does not seem to us, contrary to
11 Mr Hofmeyr's submissions, that circumstances have
12 changed at all.

13 Secondly, in fact, although Mr Hofmeyr's clients
14 appear to have had the impression that RSA was going to
15 settle, as matters currently stand, RSA has not settled
16 and we consider that it would be verging on abusive for
17 QEL to be entitled to muscle in on these proceedings in
18 circumstances where RSA is still taking an active part
19 and is running whatever arguments there are in relation
20 to each of the wordings with which we are concerned,
21 including RSA 3.

22 In the event that there is a settlement by RSA, it
23 will be open to QEL to make an application to the
24 Supreme Court to intervene, although they will have to
25 do so in the knowledge that this court has refused their

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1 prior application to intervene.

2 Mr Hofmeyr made various submissions about the
3 position of the FCA in terms of what steps it might take
4 as a regulator and also in relation to what the FCA said
5 was the remedy for QEL in the event there were
6 a settlement, in other words to commence its own
7 proceedings.

8 It is not for the court to comment at all as to the
9 regulator's position, so we do not do so, but it does
10 seem to us that in the event that RSA were not to
11 appeal, to reach some settlement, and in the event the
12 Supreme Court refused an application to intervene by
13 QEL, the course of commencing their own proceedings
14 would be one which would be open to them.

15 In those circumstances, we do consider this
16 application is far too late in one sense and premature
17 in another for the reasons I have given on behalf of the
18 court. So the application is refused.

19 Right?

20 Submissions by MR EDELMAN

21 MR EDELMAN: My Lord, I am afraid on this occasion I must
22 ask for the costs of the application. They are not
23 a party, they are not covered, they don't have the
24 benefit of the framework agreement. They're not doing
25 something in accordance with the framework agreement.

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1 The interventions that were made on time were in
2 accordance with the framework agreement and the
3 structure that everyone had agreed. This is wholly
4 outside the agreed structure and we would ask for our
5 costs and I suspect that Mr Turner will ask for his too.

6 LORD JUSTICE FLAUX: He has come on screen, so I imagine he
7 is going to, I don't know.

8 MR TURNER: I do, my Lord. There may be others because
9 we've all been sat for the last 45 minutes, even those
10 who haven't filed skeleton arguments on this.

11 LORD JUSTICE FLAUX: Well, Mr Hofmeyr?

12 MR KEALEY: Before Mr Hofmeyr says anything, on behalf of my
13 clients, I'm asking for my costs. I've been sitting
14 here for an inordinately long period of time, as have
15 your Lordships, and it's cost my clients an enormous
16 amount of money, I hope.

17 MR JUSTICE BUTCHER: I suppose a question about that,
18 Mr Kealey, is: why have you been sitting here?

19 MR KEALEY: Because you may ask me a question, because
20 I can't possibly be so rude as to disappear just in
21 case. Of course I could have jumped in my car and
22 driven down to Dorset, but that would have been rash and
23 you might have criticised me.

24 LORD JUSTICE FLAUX: Well, Mr Kealey, we certainly wouldn't
25 have ever criticised you, but on the other hand not

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1 everybody needed to be here for this particular part of
 2 the case.
 3 I suppose it could be said, likewise, that it wasn't
 4 suggested by Mr Hofmeyr that everybody else should go
 5 home or, in Mr Gaisman's case, go to the pub.
 6 MR EDELMAN: My Lord, might I add this from the FCA to avoid
 7 insurers having to speak on their own behalf: that I can
 8 well understand, and the FCA would well understand, that
 9 all insurers would have an interest in who was
 10 participating in this litigation and whether they were
 11 doing so under the framework agreement or not.
 12 MR JUSTICE BUTCHER: That's a fair point, Mr Edelman.
 13 LORD JUSTICE FLAUX: That's a very fair point.
 14 Does anybody else want to say anything?
 15 MR SALZEDO: My Lord, none of us can speak for each other,
 16 but perhaps your Lordships would invite insurers to say
 17 if any of them are not joining in the application that
 18 has been made by Mr Kealey for his clients.
 19 MR EDEY: My Lord, on behalf of my clients I join in the
 20 same application for the same reasons Mr Kealey did. We
 21 simply couldn't leave without being invited to do so,
 22 my Lord.
 23 LORD JUSTICE FLAUX: I can see that.
 24 MR KEALEY: I think Mr Gaisman should make his appearance
 25 known and also apply.

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1 MR LYNCH: My Lord, I echo Mr Edey's position.
 2 LORD JUSTICE FLAUX: Mr Gaisman is not going to be drawn,
 3 Mr Kealey.
 4 MR KEALEY: I'm very disappointed but I know he would make
 5 the application if he were.
 6 LORD JUSTICE FLAUX: Well, Mr Hofmeyr, you're faced with
 7 a number of applications for costs here.
 8 MR HOFMEYR: I am, my Lord. We have had no schedules from
 9 anybody.
 10 LORD JUSTICE FLAUX: Well, you wouldn't get schedules, would
 11 you? I mean, it's an issue of principle. The parties
 12 can provide you with schedules of costs. Even if they
 13 had provided you with schedules of costs, the last thing
 14 Mr Justice Butcher and I are going to do at 5.40 on
 15 a Friday night is to start a summary assessment of
 16 costs.
 17 Submissions in reply by MR HOFMEYR
 18 MR HOFMEYR: No, I understand that entirely, my Lord. The
 19 reality is that only two parties signified their
 20 objection to this application. The other parties did
 21 not do so at all, at any stage. They could have done
 22 so, they did not do so. They chose to be agnostic in
 23 relation to this application, and it would be quite
 24 inappropriate and unfair in those circumstances for any
 25 of those parties to be awarded any costs in this case.

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1 So far as the FCA and RSA are concerned, we would
 2 say that it is -- a costs order against one of the
 3 applicants as interveners would be entirely inconsistent
 4 with the sentiment of these proceedings, the ethos, the
 5 spirit of cooperation. The whole process which we were
 6 seeking to join in to was a process in which each party
 7 would bear their own costs, and it -- I don't know, but
 8 I suspect that when the application was made by
 9 interveners and they succeeded in intervening, costs
 10 orders were not made at that stage against the insurers
 11 or against the FCA for resisting their intervention.
 12 So we say, for those reasons, the --
 13 LORD JUSTICE FLAUX: My recollection is that the
 14 interventions weren't resisted. There was
 15 an intervention by somebody else, by an individual
 16 policyholder, which we refused, which was resisted.
 17 But I think my recollection -- Mr Justice Butcher
 18 will confirm this or deny it -- is that HAG and HIGA
 19 intervened effectively by consent. But at all events --
 20 MR JUSTICE BUTCHER: And in relation to the intervention
 21 application which we refused, no order for costs was
 22 sought.
 23 LORD JUSTICE FLAUX: Because it was an individual.
 24 MR HOFMEYR: Again, we suggest that that was in line with
 25 the intended cooperation between the parties.

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1 LORD JUSTICE FLAUX: But that application was made on time,
 2 by 24 June, and not on 30 September.
 3 MR HOFMEYR: My Lord, your Lordship has heard my submissions
 4 in relation to that.
 5 LORD JUSTICE FLAUX: Yes.
 6 MR HOFMEYR: Intervention at that stage was for
 7 participation in the trial. Intervention at this stage
 8 is for participation on the appeal. But your Lordship
 9 has my submissions. Your Lordship will have formed
 10 a view and your Lordship will express that view.
 11 LORD JUSTICE FLAUX: Yes.
 12 Do either Mr Edelman or any of the insurers want to
 13 come back on this?
 14 MR KEALEY: No, thank you, my Lord.
 15 LORD JUSTICE FLAUX: Mr Edelman?
 16 MR EDELMAN: My Lord, I've said what I need to say on costs.
 17 Ruling
 18 LORD JUSTICE FLAUX: Well, I don't think Mr Justice Butcher
 19 and I need to retire on this one.
 20 It seems to us that, certainly as regards the FCA on
 21 the one hand and Mr Turner on the other, clearly they're
 22 entitled to an order for costs against QEL.
 23 It seems to us in relation to the other insurers and
 24 the other interveners that Mr Edelman's point is
 25 a perfectly valid point. That they had an interest in

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1 knowing what was the consequence of the result of this
 2 application , there was no suggestion that they should
 3 be, as it were, sent home, and if there had been I think
 4 they would have said: well , we have an interest in this
 5 application , and therefore we're entitled to be here,
 6 and in those circumstances it does seem to me that they
 7 are all entitled to an order for costs against your
 8 client , Mr Hofmeyr.
 9 If this application had been made on time when it
 10 should have been made, on 24 June, the position might
 11 very well have been different , because then it could
 12 legitimately have been said that the application was
 13 made within the terms and spirit of the framework
 14 agreement. But your attempt, ingenious though it is , to
 15 effectively piggyback onto the framework agreement at
 16 this late stage is one which doesn't seem to us to have
 17 any merit.
 18 So I am afraid the order is one that you pay the
 19 costs of the FCA and all the insurers and interveners ,
 20 to be assessed , if not agreed.
 21 MR HOFMEYR: So be it, my Lord.
 22 LORD JUSTICE FLAUX: Does that conclude today's proceedings?
 23 MR EDELMAN: My Lord, yes, it does as far as I'm aware.
 24 Unless anybody believes I've missed anything, that's it .
 25 LORD JUSTICE FLAUX: No, well thank you all very much.

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1 MR EDELMAN: I'm sorry to have made the court sit for so
 2 long.
 3 LORD JUSTICE FLAUX: No, don't worry.
 4 MR EDELMAN: With apologies to the staff as well.
 5 MR KEALEY: And on behalf of all the insurers we're very
 6 grateful to the court for all its efforts .
 7 LORD JUSTICE FLAUX: Well, not at all, Mr Kealey. Can I say
 8 on behalf of Mr Justice Butcher and myself, as I think
 9 I may have said at the end of the trial , that we have
 10 been most impressed by the spirit of cooperation which
 11 has really been pervasive throughout, and we were
 12 assisted by submissions of a very high quality
 13 throughout, both at the trial and today. So thank you
 14 all very much indeed. And I hope everybody has a very
 15 good weekend.
 16 MR EDELMAN: Thank you.
 17 LORD JUSTICE FLAUX: Goodbye.
 18 (5.45 pm)

(The hearing concluded)

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