

BUSINESS INTERRUPTION INSURANCE TEST CASE

DRAFT TRANSCRIPT

OF DAY 1 OF TRIAL (20 JULY 2020)

Pursuant to paragraph 30 of the court's order made on 26 June 2020, what follows is a **draft** transcript.

A final transcript will be published when it is available.

OPUS2

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

Day 1

July 20, 2020

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1 Monday, 20 July 2020
2 (10.30 am)
3 Hearing via Skype for Business
4 Housekeeping
5 LORD JUSTICE FLAUX: Are we ready, Mr Edelman?
6 MR EDELMAN: My Lord, yes, we are.
7 LORD JUSTICE FLAUX: I will ask my clerk to call the case on
8 then.
9 Yes, Mr Edelman.
10 MR EDELMAN: My Lords, hopefully you will have received all
11 of the materials that you require. As you will have
12 seen, the FCA have served a 300-page opening and has
13 been confronted with almost three times that amount from
14 the insurers. We have done our best to digest the
15 material in the time available.
16 LORD JUSTICE FLAUX: We did. Mr Justice Butcher and
17 I regret our decision not to impose a page limit on you
18 all, but there it is.
19 MR EDELMAN: I'm afraid, my Lord, sometimes with the benefit
20 of hindsight, but there it is, my Lord. We have done
21 our best to try and cope with that volume of material
22 and I hope that the court has had sufficient time to be
23 able to pre-read at least a sufficient amount for the
24 purposes of today.
25 LORD JUSTICE FLAUX: Yes.

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1 MR EDELMAN: My Lord, I should have said, ordinarily I would
2 introduce all other counsel but that would use up too
3 much time and hopefully you have got a cast list.
4 LORD JUSTICE FLAUX: We have.
5 MR EDELMAN: My Lords, there is a limited amount of time
6 available and a lot of ground to cover. We will try to
7 avoid in our oral submissions repeating what we have
8 said in writing. But hopefully the defendants will not
9 take the absence of repetition as an abandonment of any
10 points, nor should they assume that just because every
11 argument that they make in their 850 pages of written
12 submissions is not addressed orally, that somehow that
13 means that somewhere on the 775th page we are to be
14 treated as having conceded an argument to which we
15 didn't respond orally. We are going to have to be
16 selective, but if there is something that they think is
17 more important than we did, then we will deal with it in
18 reply. But they shouldn't be taking anything as
19 a concession.
20 Submissions by MR EDELMAN
21 MR EDELMAN: My Lords, the court was given for the first CMC
22 information about the number of policies directly
23 affected by this litigation. I can tell you now that as
24 a result of work that the FCA has done, the estimate is,
25 it is only an estimate, that there are over 60 insurers

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1 with 700 types of policy and about 370,000 policyholders
2 who could potentially be affected by this litigation.
3 I emphasise the word "potentially" but that is, as it
4 were, a ballpark figure for how important some of the
5 issues in this case are to so many policyholders in this
6 country who are confronting the financial impact of the
7 coronavirus epidemic.
8 But can I again emphasise on behalf of the FCA that
9 it is important for the defendants to bear in mind that
10 the FC is not, if the FCA is not arguing a point or
11 testing a particular type of clause, it does not
12 represent any concession that it is not arguable or that
13 such clauses do not respond to COVID-19 losses. This
14 litigation does not seek to prevent individual
15 policyholders pursuing claims or complaints to the FOS,
16 and they should be entitled to advance arguments that
17 the FCA has not advanced if they wish to do so.
18 So the court should, we would respectfully ask,
19 avoid making findings or making any comment on issues
20 that are not before it and, as a matter of fairness,
21 should not shut out policyholders on such points in
22 circumstances where it will not be hearing arguments on
23 those points in this test case.
24 I mention that because insurers, for example
25 Argenta, have sought in their skeleton argument to shut

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1 out policyholders taking a point on backdating the date
2 of notifiability, whether the new Harbourview case is
3 wrong, by seeking a declaration in these proceedings in
4 circumstances where the point is not being argued by the
5 FCA. That is inappropriate, as are all other attempts
6 by insurers to seek the court's endorsement of their
7 stance on issues that have not been raised by the FCA.
8 This is not an ordinary piece of litigation where if
9 a claimant does not raise a point it is treated as
10 having abandoned it. These are selected issues which
11 the FCA have raised as individual issues of importance
12 which it wishes to have the court determine, and the
13 fact that other issues are not raised is neither here
14 nor there and should not be taken as any abandonment of
15 points on behalf of policyholders.
16 My Lords, with that introduction, can I move on to
17 the structure of our submissions and just to give you
18 a batting order which at least will cover us for today.
19 Firstly, it is going to be Ms Mulcahy you will be
20 hearing from substantively, dealing with the pandemic
21 and the public authority response to it, and she will
22 also deal with some policy trigger concepts that are
23 associated with that.
24 If there are one-off policy concepts, then we will
25 deal with those when we get to the policies, but that is

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1 the first topic.
 2 I will then briefly deal with principles of
 3 construction ; by and large , as one would expect,
 4 uncontroversial but there are a few points that I will
 5 want to make briefly . Then I will be dealing with
 6 prevalence, again that will be relatively brief , before
 7 we move on to the main topic for today, it may run over
 8 into tomorrow but we will see about that, and the main
 9 topic is , of course, the causation issues which have
 10 been raised by the defendants. On that, Ms Mulcahy will
 11 be dealing with the cases, but I will be saying
 12 something about causation more generally before she
 13 turns to the law. Then after she has finished with the
 14 law on causation I will be saying something additional
 15 about trends clauses and how they should be approached.
 16 My Lords, that being the agenda for today before we
 17 move on to the policies , I can tell my Lords the order
 18 in which we will be dealing with them if it is helpful
 19 now, but if not I will tell you tomorrow, with that
 20 introduction I will hand over to Ms Mulcahy. I will put
 21 my microphone on silent and I just to remind all other
 22 counsel that they should also keep their microphones on
 23 silent when they are not speaking.
 24 LORD JUSTICE FLAUX: Good morning, Ms Mulcahy.
 25 (10.39 am)

1 Submissions by MS MULCAHY
 2 MS MULCAHY: Good morning, my Lords.
 3 I am going to outline the development of the
 4 pandemic and then I am going to deal with the key
 5 events, announcements and forms of public authority
 6 action which will form the factual backdrop to the
 7 issues of construction of the policies ; for example,
 8 whether a particular step amounted to advice or to
 9 action or to a restriction within the meaning of the
 10 policies , whether it gave rise to a prevention of access
 11 or a hindrance of use, whether it constituted or gave
 12 rise to an interruption or an interference with the
 13 insured business.
 14 The factual background is also relevant to
 15 considering the causation points on the counterfactual ;
 16 for example, how divisible are the forms of public
 17 authority action , and should some of them, but not all
 18 of them, be excised when considering the "but for"
 19 counterfactual ; do you just focus on the business
 20 closure orders or the orders that can be said to fall
 21 into that category, or some of them, or do you take
 22 a broader view of the government action as a whole.
 23 I am intending to take you to the key pieces of
 24 advice and legislation and look at the documents, and
 25 I will also introduce the different categories of

1 business which have been used for the purposes of the
 2 assumed facts and show you their origins in the
 3 legislation and announcements.
 4 Those categories 1 to 7 are set out in the amended
 5 particulars of claim at paragraph 19. Just for your
 6 reference that is {A/2/13}, and they have been used by
 7 all of the parties as a useful shorthand when
 8 considering business types as they have been impacted
 9 differently by different forms of public authority
 10 action .
 11 That is the reason for taking you to these
 12 documents. I am going to be working from the agreed
 13 facts bundle, agreed facts document 1, which is the
 14 chronology of the government response to COVID-19 in the
 15 UK, which I believe you may have in hard copy, it is
 16 {C/1/1}. But I am also going to go to the accompanying
 17 bundle, which I don't think you do have in hard copy,
 18 but if you would like it and the legislation that I am
 19 also going to go to, then we would be very happy to
 20 provide with you a hard copy of that if you request it .
 21 Can I start with the pandemic but looking at it
 22 initially , and briefly , internationally .
 23 The origin of the COVID-19 pandemic was towards the
 24 end of last year with cases of pneumonia of unknown
 25 origin occurring in Wuhan, in Hubei Province in China.

1 On 31 December New Year's Eve 44 cases were reported to
 2 the World Health Organisation. If we can bring up the
 3 bundle {C/2/1} you will be able to see the announcement
 4 of that there, referring to the number of cases.
 5 On 12 January 2020 it was announced that
 6 a coronavirus had been found in samples taken from the
 7 patients concerned and the associated disease was given
 8 the name COVID-19.
 9 On 30 January the World Health Organisation declared
 10 there to be a public health emergency of international
 11 concern. We can see that on {C/2/16} in the middle of
 12 the page. You can see in bold it was declared that
 13 there was a PHEIC, a public health emergency of
 14 international concern.
 15 On 11 March, which is at {C/2/107}, the World Health
 16 Organisation declared COVID-19 to be a pandemic. And
 17 a pandemic is defined by the WHO as the "worldwide
 18 spread of a new disease" in contradistinction from the
 19 an epidemic, which is defined as "an illness or
 20 health-related behaviour or events which occur at the
 21 level of a region or community in excess of normal
 22 expectancy".
 23 Those are the gist of the global pandemic. I am now
 24 going to look at the pandemic nationally and the UK
 25 Government action in response to it . I am going to

1 simply refer to the government here, meaning the UK
2 Government, although the devolved administrations all
3 took action in their respective jurisdictions, as set
4 out in the chronology. I will mention that briefly, but
5 I was proposing to deal with it on the basis of the UK
6 Government's steps.

7 Firstly, on 22 January the UK Department of Health
8 and Social Care and Public Health England, PHE, raised
9 the national risk level from "very low" to "low". We
10 can see that on the agreed facts chronology; it is
11 {C/1/2}, it is row 2.

12 They raised it again, if we go over the page, on
13 30 January; it was raised from "low" to "moderate", and
14 that was to plan in case of a more widespread outbreak,
15 which was a prescient move.

16 On 31 January, we can see this from row 6, the
17 Chief Medical Officer for England,
18 Professor Chris Whitty, announced the first two
19 confirmed cases, both in the same family; and the
20 document relating to that is at {C/2/19}.

21 On 3 February, the government gave health advice to
22 the public regarding hand washing and sanitisation.

23 Then the first piece of legislation was enacted on
24 10 February. We have that in the legislation bundle,
25 it is {J/14/1} and these were the Health Protection

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1 (Coronavirus) Regulations 2020. If we look at
2 regulation 3, which is over the page {J/14/2}, we can
3 see that they apply:

4 "... where the Secretary of State declares, by
5 notice published on the government [Government website]
6 that the incidence or transmission of coronavirus
7 constitutes a serious and imminent threat to public
8 health, and that the incidence or transmission of
9 coronavirus is at such a point that the measures
10 outlined in these regulations may reasonably be
11 considered to be an effective means of preventing the
12 further, significant transmission of coronavirus
13 (a serious and imminent threat declaration)."

14 That declaration was made on the same day, and these
15 regulations provided for the screening and detention and
16 isolation of individuals.

17 Moving on, on 22 February -- and this is back in
18 agreed facts 1, row 9, it is {C/1/5}, Scotland was the
19 first of the national administrations to make COVID-19
20 a notifiable disease. Five days later, on
21 29 February -- over the page, row 14 -- Northern Ireland
22 followed suit.

23 In between those dates, again if we just go back
24 a page to row 10, on 25 February the government
25 instructed that travellers to the UK from certain

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1 countries had to self-isolate even if they were showing
2 no symptoms, and also told employers and business, we
3 see at row 11 that they had to adopt certain practices,
4 for example in relation to hygiene and preventing
5 travellers from certain regions from attending work.

6 Alongside this, the disease continued to spread.

7 Again, if we go over the page, row 14, on 27 February
8 Northern Ireland had its first reported case. Sorry,
9 I should have said on 28 February the first case
10 occurred in Wales. Then on 1 March, the first case in
11 Scotland.

12 Then we have at the bottom, on 2 March there is the
13 first confirmed death in the UK from COVID-19, row 16,
14 and that was announced on 5 March by the
15 Chief Medical Officer, and we see the announcement at
16 {C/2/97}.

17 Cases of the disease then rose rapidly during March
18 across the UK, and so did consequent deaths.

19 Interlinked with that spread there was a further and
20 cumulative government action. If we go to {C/2/60}, on
21 3 March the government announced an action plan. If we
22 go forward two pages {C/2/62} to just see the index,
23 I don't need to go to this in detail, you will see that
24 it was dealing with the response, the phased response to
25 the pandemic -- not declared a pandemic as yet, but to

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1 the disease, and the four phases were: to contain, to
2 delay, to research and to mitigate.

3 Then on the following day, 4 March, the government
4 issued formal advice on social distancing, heralding its
5 likely implementation soon across the UK. That can be
6 seen at page 86 of that same bundle {C/2/86}.

7 Now pausing there, 3 March is the date that we say
8 there was an "emergency", within the meaning of the
9 policies, and Arch agrees that in relation to its
10 wording.

11 There were similar concepts or are similar consents
12 under other policies, such as "a danger" or reference to
13 health reasons or concerns, and it is the FCA's case
14 that likewise these were enmeshed in the UK from this
15 point in time, from 3 March.

16 On 5 March, England made COVID-19 a notifiable
17 disease, we can see that in the same bundle at page 95
18 {C/2/95}, and Wales then followed suit on 6 March, a day
19 later.

20 On 12 March, which was the day after the WHO
21 declared a pandemic, the government raised the risk
22 level from "moderate" to "high". We can see that, it is
23 row 27 in AF1, {C/1/10}.

24 Then on the same day, again 12 March, the
25 government, by an announcement on its website,

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1 instructed anyone who showed symptoms to self-isolate
 2 even if they had not been to certain countries, and it
 3 was stated:
 4 "This means we want people to stay at home [you will
 5 see this from row 27] we want and avoid all but
 6 essential contact with others for 7 days from the point
 7 of displaying mild symptoms, to slow the spread of the
 8 infection."
 9 The government also that day issued similar guidance
 10 to those with relevant symptoms who were, and note the
 11 words, "required to stay at home". It was said:
 12 "Stay at home and do not leave your house for seven
 13 days."
 14 So individuals showing symptoms of the disease but
 15 also the businesses that they worked in were affected by
 16 that instruction. Going to work was out of the question
 17 if you had any of the relevant symptoms.
 18 Now, 12 March is our alternative case as to the date
 19 when there was an emergency, and Ecclesiastical pleads
 20 this date for its wording.
 21 I am going to come on now to 16 March and the
 22 Prime Minister's announcement on that date, which we say
 23 was a key date in relation to the chronology. But
 24 before I do, I would like to show you the scientific
 25 advice that led up to that announcement. The government

1 is advised by SAGE, the Scientific Advisory Group for
 2 Emergencies, and I am going to take you briefly to the
 3 summary in relation to two meetings.
 4 The first one is at {C/2/119}, which is a meeting on
 5 13 March. Just to go to the summary here:
 6 "Owing to a 5 to 7 day lag in data provision for
 7 modelling, SAGE now believes there are more cases in the
 8 UK than SAGE previously expected at this point and we
 9 may therefore be further ahead on the epidemic curve,
 10 but the UK remains on broadly the same epidemic
 11 trajectory in time to peak. The science suggests that
 12 household isolation and social distancing of the elderly
 13 and vulnerable should be implemented soon provided they
 14 can be done well and equitably. Individuals who want to
 15 distance themselves should be advised how to do so, SAGE
 16 is considering further social distancing interventions
 17 that may thus be applied."
 18 So it was becoming clear that because of the lag in
 19 data provision there needed to be an acceleration in
 20 action. Then on 16 March, if we go forward in the same
 21 bundle to page 125, the next meeting of SAGE has this,
 22 the summary:
 23 "On the basis of accumulating data, including on NHS
 24 critical care capacity, the advice from SAGE has changed
 25 regarding the speed of implementation of additional

1 interventions. SAGE advises there is clear evidence to
 2 support additional social distancing measures be
 3 introduced as soon as possible. These additional
 4 measures will need to be accompanied by a significant
 5 increase in testing and the availability of near
 6 real-time data flows to understand their impacts."
 7 There is a situation update at paragraph 6:
 8 "London has the greatest proportion of the UK
 9 outbreak. It is possible that London has both community
 10 and nosocomial transmission (ie in hospitals).
 11 "It is possible that there are 5,000-10,000 new
 12 cases per day in the UK (great uncertainty around this
 13 estimate).
 14 "UK cases may be doubling in number every 5 to 6
 15 days.
 16 "The risk of one person within a household passing
 17 the infection to others is estimated to increase during
 18 isolation from 50% to 70%."
 19 Then at 13:
 20 "The science suggests additional social distancing
 21 measures should be introduced as soon as possible.
 22 "At 14:
 23 "Compliance with the measures by the public is key."
 24 That was the scientific background. Just to
 25 identify where the country was in terms of reported

1 cases of disease at that point, can I take you to bundle
 2 {A/2/19}, it is paragraph 27 of the amended particulars
 3 of claim. You will recall this table from previous
 4 CMCs. If I can go to the 16 March, the position in
 5 relation to reported cases for England at that stage was
 6 there were 3,220 reported cases, and my understanding is
 7 that is agreed as between the parties.
 8 These were spread across all of England's 317 local
 9 authorities, apart from 19 of them. We know that, the
 10 agreed facts document 3, which is at {C/5/7}
 11 paragraph 20, confirms the numbers of local authorities,
 12 and there is a spreadsheet in the footnote from which
 13 that has been derived.
 14 Just staying with this for a moment, the true number
 15 of course, because of the lack of testing, is conceded
 16 by the defendants to be much higher than the number of
 17 reported cases. The actual figure is not agreed, but
 18 it is conceded to be much higher. Just to give you
 19 a reference for that, it is paragraph 23 of appendix 3
 20 to the Ecclesiastical /Amlin's skeleton where it is
 21 stated that all of the defendants, apart from QBE, who
 22 simply say it is merely higher, are agreed that the true
 23 number is much higher.
 24 Whilst the figure is not agreed and the defendant
 25 isn't being asked to determine the true prevalence, as

1 opposed to addressing certain issues on the assumption
 2 that it represents the best available evidence, you will
 3 see from the document on screen at 16 March {A/2/19}
 4 that the Cambridge Public Health England analysis
 5 estimates that by 16 March there were actually 391,000
 6 cases spread across England.
 7 In tandem and intertwined with the march of the
 8 disease across the country, on 16 March the government
 9 took further decisive preventative action, and did so by
 10 way of a public announcement from the Prime Minister.
 11 If we can go to that, it is {C/2/145}. I will take you
 12 now to the series of announcements, just working through
 13 what was said. You will see at the bottom of that page,
 14 page 145, the Prime Minister saying:
 15 "As we said last week, our objective is to delay and
 16 flatten the peak of the epidemic by bringing forward the
 17 right measures at the right time, so that we minimise
 18 suffering and save lives. And everything we do is based
 19 scrupulously on the best scientific advice."
 20 Then over the page:
 21 "Last week we asked everyone to stay at home if you
 22 had one of two key symptoms: a high temperature or a new
 23 and continuous cough.
 24 "Today we need to go further, because according to
 25 SAGE it looks as though we are now approaching the fast

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1 growth part of the upward curve.
 2 "And without drastic action cases could double every
 3 5 or 6 days."
 4 Then we have a series of steps:
 5 "So, first, we need to ask you to ensure that if you
 6 or anyone in your household has one of these two
 7 symptoms, then you should stay at home for 14 days:
 8 "That means that if possible you should not go out
 9 even to buy food or essentials other than for exercise,
 10 and in that case at a safe distance from others."
 11 The next paragraph:
 12 "And even if you don't have symptoms and if no one
 13 in your household has symptoms there is more that we
 14 need you to do now.
 15 "So, second, now is the time for everyone to stop
 16 non-essential contact with others and to stop all
 17 unnecessary travel."
 18 That is important in the context of the construction
 19 issues that arise:
 20 "We need people to start working from home where
 21 they possibly can. And you should avoid pubs, clubs,
 22 theatres and other such social venues."
 23 If we carry on towards the bottom we have the words:
 24 "So third, in a few days time -- by this coming
 25 weekend -- it will be necessary to go further and to

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1 ensure that those with the most serious health
 2 conditions are largely shielded from social contact for
 3 around 12 weeks."
 4 Towards the bottom of that page:
 5 "It is now clear that the peak of the epidemic is
 6 coming faster in some parts of the country than in
 7 others.
 8 "And it looks as though London is now a few weeks
 9 ahead."
 10 At the top of the next page:
 11 "... Londoners [should] now pay special attention to
 12 what we are saying about avoiding non-essential contact,
 13 and take particularly seriously the advice about working
 14 from home ..."
 15 Then we have advice and instruction relating to mass
 16 gatherings, so the third paragraph:
 17 "But obviously, logically as we advise against
 18 unnecessary social contact of all kinds, it is right
 19 that we should extend this advice to mass gatherings as
 20 well.
 21 "And so we've also got to ensure is that we have the
 22 critical workers we need, that might otherwise be
 23 deployed at those gatherings, to deal with this
 24 emergency.
 25 "So from tomorrow, we will no longer be supporting

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1 mass gatherings with emergency workers in the way that
 2 we normally do. So mass gatherings, we are now moving
 3 emphatically away from."
 4 So we have a series of announcements there trying to
 5 delay the epidemic, telling people to stay at home, stay
 6 at home with symptoms, to stop non-essential contact and
 7 travel, to work from home.
 8 LORD JUSTICE FLAUX: What day of the week was 16 March? Was
 9 it a Tuesday?
 10 MS MULCAHY: It was a Monday, my Lord.
 11 LORD JUSTICE FLAUX: It was a Monday, was it?
 12 MS MULCAHY: It was a Monday.
 13 LORD JUSTICE FLAUX: Monday, was that the week of the
 14 football match? It was certainly the week of
 15 Cheltenham, wasn't it, or was it the week before?
 16 Perhaps it was the week before.
 17 MS MULCAHY: I think it may have been the week before.
 18 LORD JUSTICE FLAUX: I think it may have been the week
 19 before. Yes, it was. Thank you.
 20 MS MULCAHY: Then we have this prohibition on mass
 21 gatherings. What we would say about this is clearly
 22 this was a national strategy trying to deal with
 23 a national emergency.
 24 We have on the same date, and it is page 139
 25 {C/2/139} in this bundle, so slightly earlier, but on

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1 the same date the government is issuing further specific
 2 guidance on social distancing and on what vulnerable
 3 people need to do.
 4 We say 16 March is significant in this case because
 5 it would appear to be a key turning point in behaviour.
 6 You will have noted the imperative language that was
 7 used in the Prime Minister's announcement, and we say
 8 that this was part of the government action or advice
 9 within the meaning of the wordings, and that this and
 10 the subsequent social distancing advice and instruction
 11 amounted to prevention of access, hindrance of use,
 12 closure, interruption, et cetera.
 13 It is 16 March that is the first action that the FCA
 14 is relying on as triggering all those clauses; that is
 15 paragraph 69 of its skeleton at {I/131} but we don't
 16 need to go to it.
 17 We can see that the following day the Chancellor
 18 announced a package of financial support for businesses,
 19 and it is at page 168 of this bundle, including
 20 £330 billion worth of guarantees {C/2/168}. That was
 21 following on from a package of 30 billion the previous
 22 week, so one can see that the government was
 23 anticipating the economic impact.
 24 If we go over the page to {C/2/169} those measures
 25 are set out and it is made clear that they are seeking

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1 to support businesses and that the economic response is
 2 directed at giving government-backed guaranteed loans to
 3 support businesses to get through this.
 4 I am going to move on now to further UK Government
 5 action.
 6 I'm sorry, I think I had it the wrong way round.
 7 I am told the Cheltenham Gold Cup was on 13 March,
 8 my Lord, so it was the previous week.
 9 Moving on now to what happened after 16 March, we
 10 have a further announcement on 18 March, it is page 221
 11 of this bundle {C/2/221}.
 12 In this announcement, can we go over to the second
 13 page of it, {C/2/222} the Prime Minister is reiterating
 14 advice to stay at home and work at home but is also
 15 taking further action. If I start at the top, he
 16 stated:
 17 "I want to repeat that everyone -- everyone -- must
 18 follow the advice to protect themselves and their
 19 families, but also -- more importantly -- to protect the
 20 wider public. So stay at home for seven days if you
 21 think you have the symptoms."
 22 A reminder of what the key symptoms were, and then
 23 in the next paragraph:
 24 "Avoid all unnecessary gatherings -- pubs, clubs,
 25 bars, restaurants, theatres and so on and work from home

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1 if you can."
 2 Then we have further down the paragraph:
 3 "And we come today to the key issue of schools where
 4 we have been consistently advised that there is an
 5 important trade off. And so far the judgment of our
 6 advisers has been that closing schools is actually of
 7 limited value in slowing the spread of the epidemic.
 8 "And that is partly because counterintuitively
 9 schools are actually very safe environments. And in
 10 this disease and epidemic children and young people are
 11 much less vulnerable.
 12 "And hitherto the advice has been to keep the
 13 schools open if possible ..."
 14 The next paragraph:
 15 "So looking at the curve of the disease and looking
 16 at where we are now -- we think now that we must apply
 17 downward pressure, further downward pressure on that
 18 upward curve by closing the schools.
 19 "So I can announce today and Gavin Williamson
 20 making a statement now in the House of Commons that
 21 after schools shut their gates from Friday afternoon [so
 22 that is 20 March] they will remain closed for most
 23 pupils ..."
 24 That is Friday 20 March:
 25 "... for the vast majority of pupils -- until

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1 further notice. I will explain what I mean by the vast
 2 majority of pupils.
 3 "The objective is to slow the spread of the virus us
 4 and we judge it is the right moment to do that."
 5 Then he states that we also need to keep the NHS
 6 going, and other critical workers with children to keep
 7 doing their jobs. So the penultimate paragraph on that
 8 page:
 9 "We therefore need schools to make provision for the
 10 children of these key workers who would otherwise be
 11 forced to stay home. And they will also need to look
 12 after the most vulnerable children."
 13 If we go to the top of the next page {C/2/223} we
 14 can see that the Prime Minister says:
 15 "We are simultaneously asking nurseries and private
 16 schools to do the same ..."
 17 This is relevant to the policies. Arch in its
 18 defence, paragraph 49.9, pleads correctly that schools
 19 were closed from 20 March. However, Ecclesiastical in
 20 its defence, it is paragraph 16.3(b), says that this
 21 wasn't a legal prohibition and it didn't prevent or
 22 hinder schools from remaining open. So they take
 23 a different line in relation to this.
 24 The next day, 19 March, which is the Thursday of
 25 that week, the coronavirus bill was returned through

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1 parliament on an emergency basis, including measures to
2 contain and slow the virus. It is a long Act, we don't
3 need to go to much of it, but I will show that you in
4 a moment.

5 If I just first deal with the announcement on
6 20 March, it is at page 240 of this bundle {C/2/240},
7 continuing the daily cumulative set of announcements.
8 If we go on to the next page {C/2/241}, we can see at
9 the top, having set out the ambition of the government
10 to turn the tide against coronavirus within three
11 months, he says:

12 "We are going to do it with testing. We are going
13 to do it with new medicines, and with new digital
14 technology ...

15 "And ... now we are going to defeat this disease
16 with a huge national effort to slow the spread by
17 reducing unnecessary social contact."

18 He thanks everyone for following the guidance issued
19 on Monday, and then identifies again what that guidance
20 was, and then it says:

21 "But these actions that we're all taking together
22 [again reference to "actions"] are already taking helping
23 to take the strain off our NHS."

24 Towards the bottom, the penultimate paragraph:

25 "I must absolutely clear with you: the speed of that

25

1 eventual recovery depends on our ability, our collective
2 ability, to get on top of the virus now."

3 Then we have further action over the page, fourth
4 paragraph:

5 "We are collectively telling, telling cafes, pubs,
6 bars, restaurants to close tonight ..."

7 So this is on 20 March, the Friday:

8 "... as soon as they reasonably can, and not to open
9 tomorrow.

10 "Though to be clear, they can continue to provide
11 take-out services.

12 "We're also telling nightclubs, theatres, cinemas,
13 gyms and leisure centres to close on the same timescale.

14 "Now, these are places where people come together
15 and indeed the whole purpose of these business is to
16 bring together. But the sad thing is that for today for
17 now, at least physically, we need to keep people apart.

18 "And I want to stress that we will review the
19 situation each month to see if we can relax any of these
20 measures."

21 Then skipping two paragraphs:

22 "So that's why, as far as possible, we want you to
23 stay at home ..."

24 That's what was said on 20 March. The UK Government
25 is continuing to shut down individuals and businesses in

26

1 their activities. Here, as we will see when we get to
2 the categories, we have category 1 businesses, cafes,
3 pubs, bars, restaurants, other than take-out, and
4 category 2, clubs, theatres, cinemas, et cetera being
5 affected. And RSA, for example, accepts this
6 announcement and this order to close as closure of these
7 businesses; it is paragraph 40(e) of its defence.

8 Now, that shut down of these businesses was
9 enshrined in legislation and it happens on 21 March, on
10 21 March regulations. If we can go to those, it is in
11 {J/15/1} pages 1 to page 5, they are quite short. This
12 is the first of two sets of regulations, the first more
13 limited and the second broader.

14 I will go first to the explanatory note on page 4,
15 {J/15/4}. At the bottom, we can see that:

16 "These regulations require the closure of businesses
17 selling food or drink for consumption on the premises,
18 and businesses listed in the schedule, to protect
19 against the risks to public health arising [over the
20 page] from coronavirus. The closure lasts until
21 a direction is given by the Secretary of State ...
22 required to keep ... under review every 28 days.

23 If we go back to regulation 2, it is on
24 page {J/15/2} of that document, it is headed
25 "Requirement to close premises and businesses during the

27

1 emergency", and we can see that:

2 "A person who is responsible for carrying
3 on a business, which is listed in part 1 of the schedule
4 ..."

5 Just to divert there to a regulation 2.9(b):

6 "A 'person responsible for carrying on a business'
7 includes the owner, proprietor, and manager of that
8 business."

9 So if we go back at 2(1)(a), during the relevant
10 period they must close any premises, or part of the
11 premises, in which food or drink are sold for
12 consumption on those premises, and must cease selling
13 food or drink for consumption on its premises; or, if
14 they sell food or drink for consumption off the
15 premises, they must cease selling food or drink for
16 consumption on its premises during the relevant period.

17 And at 4, regulation 2(4), I will move to the
18 schedule in a moment, that relates to part 1 of the
19 schedule:

20 "A person responsible for carrying on a business
21 which is listed in part 2 of the schedule must cease to
22 carry on that business during the relevant period."

23 Then if we go back to page {J/15/4} we can see at
24 part 1 that part 1 relates to restaurants, cafes, bars
25 and public houses, with some limited exceptions in

28

1 relation to cafes. Part 2 is cinemas, theatres,
 2 nightclubs, concert halls, et cetera, spas, indoor
 3 skating rinks, indoor fitness studios, gyms, et cetera.
 4 So we have designated the part 1 businesses
 5 category 1, for the purpose of the categorisation, and
 6 then the part 2 businesses are category 2.
 7 So you can see there that restaurants, cafes,
 8 et cetera had to close completely, except for take-away,
 9 which you will see when we get to it the defendants are
 10 arguing means they didn't have to close; because they
 11 could stay open for take-away, it is said that there was
 12 no prevention of access or no complete closure.
 13 Category 2 businesses had to close completely. As
 14 we have seen, individuals had already been told to stay
 15 at home and to avoid restaurants, so the businesses
 16 couldn't serve them anyway, except for take-away food or
 17 drink.
 18 If we go back to regulation 3 on page 2, we can see
 19 that contravening regulation 2 was a criminal offence.
 20 Those are the 21 March regulations and then we have
 21 a further announcement of the Prime Minister on
 22 22 March. If we go back to {C/2/264}. This was on
 23 a Sunday, 22 March, and if I can go over the page to
 24 {C/2/265} we can see towards the top the Prime Minister
 25 thanking everyone who didn't visit their mother on

1 Mother's Day and then he says:
 2 "Everyone who was forced to close a pub or a
 3 restaurant or a gym or any other business that could
 4 have done fantastic businesses on a great day like this.
 5 "Thank you for your sacrifice. I know how tough it
 6 must be."
 7 Then skipping a paragraph he says:
 8 "The reason we are taking these unprecedented
 9 measures to prop up businesses, superior businesses and
 10 support our economy and these preventative measures is
 11 because we have to slow the spread of the disease and to
 12 save thousands of lives."
 13 Then he sets out the stage of the plan he advertised
 14 at the outset:
 15 "We have to take special steps to protect the
 16 particularly vulnerable."
 17 And states there are probably about 1.5 million in
 18 all, and then says:
 19 "But this shielding [which is the protection of the
 20 vulnerable] will do more than any other single measure
 21 that we are setting out to save life. That is what we
 22 want to do."
 23 So that deals with the fact of shielding. We have
 24 a reminder that tomorrow, which is the Monday, the 23rd,
 25 you should not send your child to school unless you have

1 been identified as a key worker. Then towards the
 2 bottom:
 3 "You have to stay two metres apart; you have to
 4 follow the social distancing advice."
 5 Then he says this:
 6 "I say this now -- on Sunday evening -- take this
 7 advice seriously, follow it, because it is absolutely
 8 crucial."
 9 Then at the bottom:
 10 "... we will keep the implementation of these
 11 measures under constant review ..."
 12 Over the page {C/2/266}:
 13 "You are doing your bit in following this advice to
 14 slow the spread of this disease."
 15 The following day, 23 March, the same theme
 16 continues, it is page {C/2/290}:
 17 "The coronavirus is the biggest threat this country
 18 has faced for decades ..."
 19 Then he goes on over the page:
 20 "Without a huge national effort to halt the growth
 21 of this virus, there will come a moment when no health
 22 service in the world could possibly cope ..."
 23 Go on a couple of paragraphs:
 24 "To put it simply, if too many people become
 25 seriously unwell at one time, the NHS will be unable to

1 handle it -- meaning more people are likely to die, not
 2 just from coronavirus but from other illnesses as well.
 3 "So it's vital to slow the spread of the disease."
 4 Skipping a paragraph:
 5 "That's why we have been asking people to stay at
 6 home during this pandemic.
 7 "And though huge numbers are complying -- and
 8 I thank you all -- the time has now come for us all to
 9 do more.
 10 "From this evening I must give the British people
 11 a very simple instruction -- you must stay at home.
 12 "Because the critical thing we must do is stop the
 13 disease spreading between households.
 14 "That is why people will only be allowed to leave
 15 their home for the following very limited purposes:
 16 "Shopping for basic necessities, as infrequently
 17 as possible.
 18 "One form of exercise a day ...
 19 "Any medical need, to provide care or to help
 20 a vulnerable person, and
 21 "Travelling to and from work, but only where this is
 22 absolutely necessary and cannot be done from home."
 23 "That's all -- these are the only reasons you should
 24 leave your home."
 25 Then a bit further down:

1 "If you don't follow the rules the police have the
2 powers to enforce them, including through fines and
3 dispersing gatherings .
4 "To ensure compliance with the government's
5 instruction to stay at home, we will immediately:
6 "Close all shops selling non-essential goods
7 including clothing and electronic stores and other
8 premises including libraries , playgrounds and outdoor
9 gyms, and places of worship.
10 "We will stop all gatherings of more than two people
11 in public -- excluding people you live with.
12 "And we'll stop all social events, including
13 weddings, baptisms and other ceremonies, but excluding
14 funerals ."
15 Then over the page {C/2/292}:
16 "I know the damage that this disruption is doing and
17 will do to people's lives , to their businesses and to
18 their jobs."
19 Then down a paragraph:
20 "And I can assure you that we will keep these
21 restrictions under constant review . We will look again
22 in three weeks, and relax them if the evidence shows
23 that we are able to."
24 Finally , I would just ask you to note the last line :
25 "... I urge you at this moment of national emergency

33

1 to stay at home ..."
2 That was announcement on the 23 March. On the same
3 date the government issued yet further advice on
4 business closures , we don't need to go to it , it was
5 updated over the following days and again in May to
6 reflect legislative changes.
7 On the following day, 24 March, the government
8 issued specific advice to the accommodation industry,
9 which we have classed as category 6, and that is
10 relevant especially to Argenta and to RSA1, the
11 Cottagesure policy . If we could just look at that
12 briefly , it is on page 300 of the bundle {C/2/300}. It
13 makes it clear a third of the way down:
14 "Businesses providing holiday accommodation ...
15 should now take steps to close for commercial use as
16 quickly as is safely possible .
17 "Full consideration should be given to the possible
18 exclusions for residents that should be allowed to
19 remain. Any decision to close should be implemented in
20 full compliance with the social distancing guidelines ."
21 Then some limited exceptions:
22 "Hotels and other accommodation providers should be
23 able to remain open if:
24 "They are part of the response to support key
25 workers or vulnerable groups.

34

1 "There is a specific need for some or all of the
2 sites to remain open (for example they are housing
3 people who have been flooded out of their homes being
4 used by public services to provide emergency
5 accommodation or are not able to return to their primary
6 residence)."
7 Supporting homelessness, homeless people; or if
8 a holiday park or caravan park is somebody's primary
9 residence they could remain on site .
10 That is relevant to the accommodation industry.
11 Then on the next day, 25 March, the Coronavirus Act
12 comes into force . If we can go to that, I am just going
13 to go to the explanatory note to it , it is at {J/12/1}.
14 I am going to go to explanatory note 3. Having
15 overviewed the Act, it states :
16 "The Act is part of a concerted effort across the
17 whole of the UK to tackle the COVID-19 outbreak. The
18 intention is that it will enable the right people from
19 public bodies across the UK to take appropriate actions
20 at the right times to manage the effects of the
21 outbreak ."
22 So it is making clear that it is one part of
23 a concerted effort across the whole of the UK and it is
24 one part of the overall solution .
25 Now, this Act dealt with the need for more doctors

35

1 and social workers and for registration of births and
2 deaths during the crisis , so we don't need to go to it
3 specifically but that is where it fits in the
4 chronology.
5 Then we turn to the 26 March regulations . As agreed
6 by the parties in Agreed Facts 3, it is at {C/5/7}. Can
7 I take you to paragraph 21, this is an agreed fact that
8 by 26 March there were reported cases in all but one of
9 the lower tier local authorities within England.
10 If we can go back to the particulars of claim at
11 paragraph 27, it is {A/2/19} I think, if we look at
12 26 March we can see there that the reported cases
13 amounted to 17,956 at 26 March. And by
14 Cambridge University PHE's estimate, which is not agreed
15 by the defendants, they were saying that in fact there
16 were 2.47 million cases at that time across England.
17 That's the context in which the government then
18 enacts the 26 March regulations, which are important and
19 I am going to take you through them and show you how the
20 categorisation arises in the light of them. If we can
21 go to those now, it is {J/16/12}. This is for England,
22 but there was similar legislation enacted -- no, sorry ,
23 those are the explanatory notes to the regulations .
24 I'll just deal with those while I am here.
25 The regulations require the closure of businesses

36

1 sell food or drink for consumption on the premises, and
 2 businesses listed in part 2 of schedule 2. We see it is
 3 to protect against the risks to public health arising
 4 from coronavirus, except for limited permitted uses.
 5 Restrictions are imposed on businesses listed in part 3
 6 of schedule 2 which are permitted to remain open. The
 7 regulations also prohibit anyone leaving the place where
 8 they live without reasonable excuse, and ban public
 9 gatherings of more than two people. And the closures
 10 and restrictions last until they are terminated by
 11 a direction given by the Secretary of State. Then
 12 a reference to the necessity for review.
 13 If we can go back to page 1 of that document,
 14 {J/16/1}, and I will go forward to regulation 4(1),
 15 which is on page 2. We can see there, and this mirrors
 16 the 21 March regulations:
 17 "A person responsible for carrying on a business
 18 which is listed in part 1 of schedule 2."
 19 Could we go to page 10 to see the list {J/16/10}.
 20 We can see there towards the bottom, again restaurants,
 21 cafes, workplace canteens may remain open where there is
 22 no practical alternative, bars, public houses, so almost
 23 the same list as in the previous regulations. So that
 24 is our category 1.
 25 If we go back to page 2 now, we can see that they

1 had to close except for take-away. The same
 2 formulation. If we go over the page we can see the rest
 3 of 4(1)(a). It is worth noting at subparagraph (6) that
 4 if the business in questions listed in part 1 -- I will
 5 come back to part 2 in a moment -- forms part of
 6 a larger business, business B, the person responsible
 7 for carrying on business B complies with the requirement
 8 if it closes down business A. So that is where there is
 9 a mixed use business and there is a requirement then to
 10 close down that part of the business that relates to
 11 category 1, except for take-away.
 12 Looking at regulation 4(4), this is the businesses
 13 listed in part 2 of schedule 2, and we will just go to
 14 those, this is category 2, they are on pages 10 to 11 of
 15 this document {J/16/10} to page 11. You can see them at
 16 the bottom, similar list to last time; cinemas,
 17 theatres, nightclubs, bingo halls, and then over the
 18 page, yes, concert halls, casinos, funfairs, et cetera.
 19 So those are the businesses that are in category 2.
 20 If we go back, please, to page 3 I think it is
 21 {J/16/3}, at regulation 4(4):
 22 "A person responsible for carrying on [such
 23 a business] must cease to carry on that business or to
 24 provide that service during the emergency period."
 25 So that is a requirement to cease to carry on the

1 business.
 2 We then have regulation 5(1), and it states:
 3 "A person responsible for carrying on a business,
 4 not listed in part 3 of schedule 2 ..."
 5 Let's have a look at part 3 of schedule 2. It is
 6 pages 11 to 12 {J/16/11}. Those are the businesses that
 7 could stay open, and we have called these category 3
 8 businesses. So one can see there food retailers,
 9 supermarkets, off-licences, pharmacies, newsagents,
 10 homeware, funeral directors, and then some health ones
 11 at 37, including medical and health services.
 12 Those are the businesses that were permitted to stay
 13 open. They weren't being required to close, albeit that
 14 there were restrictions being imposed on them.
 15 If we go back to regulation 5(1), we can then look
 16 at the businesses other than those businesses {J/16/3}
 17 and we can see that a business not listed in part 3,
 18 offering goods for sale or hire in a shop, or providing
 19 library services must, during the emergency period:
 20 "(a) cease to carry on that business or provide that
 21 service except by making deliveries or otherwise
 22 providing services in response to orders received ..."
 23 Through a website or otherwise by online
 24 communication, by telephone or by post. And they had to
 25 close any premises which were not required to carry out

1 its business, or provide its services as permitted by
 2 that subparagraph above, and to cease to admit any
 3 person to its premises who is not required to carry on
 4 its business or provide its services as permitted by
 5 subparagraph (a).
 6 So this is our category 4 businesses: where you have
 7 non-essential shops offering goods for sale or hire,
 8 they had to close premises, they had to cease carrying
 9 on business and cease admitting persons, except to the
 10 extent that the business could be carried on by online
 11 or telephone or postal orders.
 12 There is then a further category where there are no
 13 specific regulations, the regulations are completely
 14 silent about them, other businesses; they are not
 15 prescribed to close, nothing is said about them staying
 16 open. There is other guidance relating to them such as
 17 the 2-metre rule and other employer duties, but these
 18 are basically service businesses, such as accountants or
 19 law firms or manufacturing businesses and they are not
 20 dealt with specifically by the regulations. We have
 21 identified those as category 5.
 22 I move on now to category 6, that is dealt with at
 23 regulation 5(3) which is on the screen:
 24 "Subject to paragraph (4), a person responsible for
 25 carrying on a business consisting of the provision of

1 holiday accommodation, whether in a hotel, hostel, bed
 2 and breakfast accommodation holiday apartment
 3 [et cetera], must cease to carry on that business during
 4 the emergency period."
 5 So we have a requirement to cease business except in
 6 the limited circumstances set out in regulation 5(4),
 7 which you will see accommodation can be provided for
 8 a person who is unable to return to their main residence
 9 or needs accommodation while moving house.
 10 If we go over the page, I think there is more on the
 11 list {J/16/4}. Yes. Needs accommodation to attend
 12 a funeral, accommodation for the homeless, to host blood
 13 donation sessions. So there are some limited
 14 exceptions, but holiday accommodation, generally
 15 speaking, had to cease business.
 16 Then we have regulation 5(5), and this is category
 17 7, relating to places of worship. You can see there
 18 that a person responsible for a place of worship must
 19 ensure that during the emergency period the place of
 20 worship is closed, except for the uses permitted in
 21 paragraph (6). There are some limited uses there, being
 22 a place of worship may be used for funerals, to
 23 broadcast an act of worship and to provide essential
 24 voluntary services.
 25 So that is category 7 in relation to churches. We

1 have also put schools into that category, but schools
 2 are not dealt with in these regulations. We have seen
 3 the announcement of 18 March requiring schools to be
 4 closed, and the position in relation to schools is that
 5 there was power to close them provided in the
 6 Coronavirus Act, it is at {J/13/25}, sections 37 and 38
 7 and schedules 16 and 17 to that Act. See at the bottom
 8 there "temporary closure of educational institutions"
 9 and schedule 16 and 17, which is {J/13/157} and 176, we
 10 don't need to go to them. Those powers were not
 11 exercised, but there was a power to close them.
 12 Ecclesiastical and Amlin, in their skeleton, say
 13 that schools were first directly subject to legally
 14 restrictive regulations on 1 June 2020. We say that
 15 there was this impact of the threat of legislative
 16 interference by the Coronavirus Act itself on this much
 17 earlier date.
 18 If I can go back now to the 26 March regulations at
 19 {J/16/4} and look at regulation 6, which imposed
 20 restrictions on the movement of individuals. It is made
 21 clear there:
 22 "During the emergency period no person may leave the
 23 place where they are living without reasonable excuse."
 24 Then the reasonable excuses are identified there,
 25 including the need to obtain basic necessities,

1 exercise, seek medical assistance, provide care
 2 assistance, donate blood. Then (f) is important:
 3 "To travel for the purposes of work or to provide
 4 voluntary or charitable services, where it is not
 5 reasonably possible for that person to work, or to
 6 provide those services, from the place where they are
 7 living."
 8 There are some other further exceptions over the
 9 page.
 10 Now, that needs to be read obviously with the
 11 government announcement on 23 March. You must only go
 12 to work if "it is absolutely necessary".
 13 Then we can see here at (i) accessing critical
 14 services, including childcare or educational facilities,
 15 where these are still available to a child in relation
 16 to whom that person is the parent.
 17 So we would say that these are the exception, not
 18 the rule, in relation to the ability to travel for work
 19 and to go to the premises where you work. If you could
 20 work from home, you had to work from home.
 21 Regulation 7 restricts gatherings:
 22 "During the emergency period no person may
 23 participate in a gathering in a public place of more
 24 than two people ..."
 25 With some limited exceptions, including where the

1 gathering is essential for work purposes, and to attend
 2 a funeral.
 3 Then we have regulations 8 to 11, which deal with
 4 enforcement. So the above restrictions on individuals
 5 and businesses, which are all in the same set of
 6 legislation, are then enforceable by the relevant
 7 authorities. It refers to "relevant person". They are
 8 designated later on 4 April 2020. Any offence under the
 9 regulations could be fined; it was a summary offence.
 10 May I just go back to regulation 3, which details
 11 the emergency period. It's at page 2 {J/16/2}. It
 12 makes it clear that the emergency period starts when the
 13 regulation comes into force, ends when it is
 14 specifically directed to end, and at (2) there is a need
 15 for review, the Secretary of State must review the need
 16 for the restrictions and requirements at least once
 17 every 21 days, with the first review being carried out
 18 by 16 March, in order to see whether they were still
 19 needed.
 20 So we have a continuation of the same theme. We
 21 have a national disease, we have a national public
 22 authority response. We have intermingled effects on
 23 individuals and businesses. We would say that this is
 24 all two sides of the same coin. If you are telling
 25 people on the one hand to stay away from businesses, and

1 you are closing the business on the other, we would say
 2 that is one and the same thing; the purpose is to
 3 prevent access to those businesses, even it is for the
 4 ultimate purpose of protecting public health.
 5 We would say from the beginning, the danger and
 6 emergency of COVID-19 posed a national threat. It
 7 spread nationally and it required an elicited national
 8 response; and at each stage, one can see from these
 9 announcement and the regulations, the government is
 10 acting on the basis of emergency, danger and health
 11 concerns. The restrictions prevented activity on the
 12 part of individuals and businesses in combination,
 13 collectively causing losses. That's why we contend that
 14 the disease and public authority action and the specific
 15 types of public authority action form an indivisible
 16 whole.
 17 As the Secretary of State for Health said later, on
 18 28 April -- can we go to {C/1/36} and it is the 28 April
 19 row in AF1, it is at the bottom -- the lockdown was
 20 imposed at the same time across the whole of the UK for
 21 this reason:
 22 "There was a big benefit, I think, as we brought in
 23 the lockdown measures, of the whole country moving
 24 together. We did think about moving with London and the
 25 Midlands first, because they were more advanced in terms

1 of the number of cases, but we decided that we are
 2 really in this together, and the shape of the curve, if
 3 not the height of the curve, has been very similar
 4 across the whole country. It went up more in London but
 5 it's also come down more, but the broad shape has been
 6 similar, which is what you would expect given that we
 7 have all been living through the same lockdown measures.
 8 The other thing to say is that it is not just about the
 9 level, it is also about the slope of the curve and if
 10 the R [which is the doubling rate] goes above 1
 11 anywhere, that would eventually lead to an exponential
 12 rise and a second peak and an overwhelming of the NHS in
 13 that area unless it's addressed, so although the level
 14 of the number of cases is different in different parts,
 15 the slope of the curve has actually been remarkably [if
 16 we can go over the page to page 37 please] similar
 17 across the country, so that argues for doing things as
 18 a whole country together."
 19 That was the basis on which this was a national
 20 lockdown. I will come on to the local lockdown in
 21 Leicester in a little bit. But under the March
 22 regulations the government could disapply any lockdown
 23 measure at any stage, it had to positively review them
 24 every three weeks, which it did, but it nonetheless
 25 continued that national lockdown until recently, when it

1 started to lift the lockdown and apply more limited
 2 measures, such as to Leicester.
 3 I have a little bit more to deal with on this topic,
 4 I am just wondering whether that might be a convenient
 5 moment for the shorthand writers to have a break, and
 6 then I will finish off this topic and deal with common
 7 triggers before handing back to Mr Edelman.
 8 LORD JUSTICE FLAUX: How long a break do you want, five or
 9 ten minutes?
 10 MS MULCAHY: I am in your lands, my Lord.
 11 LORD JUSTICE FLAUX: Because we are dealing with things
 12 remotely, my watch says it is just before quarter to 12,
 13 if we say just after 10 to 12, so that gives us sort of
 14 seven or eight minutes. Okay?
 15 MS MULCAHY: Yes, thank you very much.
 16 LORD JUSTICE FLAUX: Okay, see you in a second.
 17 MS MULCAHY: Yes.
 18 (11.43 am)
 19 (Short break)
 20 (11.52 am)
 21 LORD JUSTICE FLAUX: Are you ready, Ms Mulcahy?
 22 MS MULCAHY: Yes, my Lord.
 23 Much is made by the defendants of whether something
 24 is mandatory, in the sense of legal enactments that are
 25 enforceable and legally binding. However, it has to be

1 remembered that there was a legal underpinning to all of
 2 the government's requirements whether or not they were
 3 specifically legislated for, and this is also relevant
 4 to the businesses which remained even partially open, of
 5 which there were very few. This is because all
 6 businesses had legal duties as employers and occupiers,
 7 such as tortious duties of care, duties under the health
 8 and safety legislation, contractual duties under
 9 employment contracts; and those duties were owed to
 10 employees, they were owed to customers, they were owed
 11 to contractors and to other visitors. They included, in
 12 relation to employers, the need to ensure so far as
 13 reasonably practicable the health and safety at work of
 14 employees through implementation of a safe system of
 15 work.
 16 So we would say it wasn't open to policyholders to
 17 breach the UK Government's advice and guidance without
 18 risking a breach of their legal duties regarding the
 19 health and safety of employees, and as occupiers in
 20 relation to the public.
 21 These duties, in combination with the requirements
 22 to avoid unnecessary travel, self-isolation and the two
 23 metre rule, made it impracticable for many businesses to
 24 function, even if in law they could remain open or
 25 partially open.

1 Many, even if they were permitted to stay open, had
 2 to close temporarily, interrupting their business, to
 3 remodel their premises to install plastic screens or
 4 distancing markers and impose sanitisers and put up
 5 warnings, et cetera, which will have increased the cost
 6 of working in that regard.

7 But quite apart from the legal duties as employers
 8 and occupiers, these policies also contain reasonable
 9 precautions or reasonable care conditions, requiring
 10 policyholders to take all reasonable precautions to
 11 prevent injury to any person and to comply with all
 12 legal requirements and safety regulations.

13 To take one example, if we look at the Arch 1
 14 policy, it is at {B/2/64} to page 65, you will find this
 15 in every policy, you can see at the bottom, it is not
 16 particularly easy to read:

17 "If in relation to any claim you have failed to
 18 fulfil any of the following conditions you will lose
 19 your right to indemnity or payment for that claim."

20 Then you will take "all reasonable precautions to
 21 prevent" -- this is on page {B/2/65} at 2 -- "accident
 22 or injury to any person". Then at (c) "comply with all
 23 legal requirements and safety regulations and conduct
 24 the business in a lawful manner".

25 So, viewed in that context, the FCA contends that

1 the government's advice and its guidance was as much of
 2 a restriction as any legislative measures, and had to be
 3 complied with. It came from an authority, indeed the
 4 government, it was the State speaking, it was imperative
 5 in nature and it was backed by the implicit or explicit
 6 power to legislate if not complied with. And it was
 7 taken and obeyed as mandatory. It wasn't simply
 8 a matter of individual choice, as the defendants
 9 contend; ignoring it would have put a policyholder in
 10 breach of its duties as employer and occupier, and in
 11 breach of the policy conditions.

12 We would say that the advice here was a world away
 13 from the government's advice to eat five portions of
 14 fruit and vegetables a day, which is Mr Kealey's attempt
 15 to reduce the argument to the absurd; or to the advice
 16 not to smoke or drink more than 14 units of alcohol
 17 a week, which Zurich comes up with. This was of
 18 a completely different order. And in terms of what was
 19 legislated for, orders to cease part or all of the
 20 business or orders for customers to stay at home,
 21 prevented or hindered access or use of premises and
 22 interfered or interrupted businesses as much as direct
 23 orders to close premises.

24 Just to briefly address some of the points that are
 25 made by the insurers in their skeletons, the public

1 authority response was not just to reduce the number of
 2 people mixing, and to promote social distancing, as for
 3 example Zurich suggests; it was to prevent, to the
 4 greatest extent possible, people of different households
 5 were being physically together in the same place.

6 The defendants refer to the authority of Dolan,
 7 which says the aim was to prevent such mixing in indoor
 8 spaces. You will see the quote at paragraph 100 of
 9 Zurich's skeleton, we don't need to go to it. But how
 10 do you prevent people from physically being in indoor
 11 spaces? You do it by preventing access to those spaces
 12 and restricting those businesses' ability to allow
 13 access. And that is what the public authority response,
 14 including these regulations, did.

15 Secondly, the ability of people to access business
 16 premises was clearly the exception, and not the rule, as
 17 it would seem to be suggested. All restaurants, cafes,
 18 pubs and bars had to close, except for the limited
 19 ability to serve take-away. All theatres, cinemas,
 20 et cetera, in category 2, were closed except for the
 21 limited ability to broadcast a show.

22 Exceptionally, a few types of businesses stayed open
 23 for absolutely essential services, chiefly food and
 24 health, but even they had to comply with social
 25 distancing and employers' duties, which would restrict

1 activity. All non-essential shops selling goods,
 2 department stores, et cetera, had to close, except to do
 3 online and telephone orders.

4 Most people could not access those places due to the
 5 restrictions on individual movement and the restrictions
 6 on the businesses.

7 As for the businesses that were not expressly
 8 allowed to stay open, like accountants, most of those
 9 closed too. Employees had to work from home where they
 10 could, so they had no access to those premises. Holiday
 11 accommodation shut, except for extremely limited
 12 categories. The same goes for schools and places of
 13 worship. We all know it, we all lived it, the UK
 14 physically shut down. That was the reality.

15 Save for the essential premises or parts of premises
 16 that remained open, like food shops, for the insurers to
 17 suggest, as they do in some cases, that there was no
 18 prevention of access, or closure or similar, defies any
 19 reasonable view of what the lockdown involved and the
 20 enormous stresses that it has placed on businesses that
 21 have not been able to continue their business; and it is
 22 both factually and legally wrong, and entirely fails to
 23 reflect reality to suggest otherwise.

24 So far as the restrictions on movement are
 25 concerned, they were directed at preventing access to

1 particular premises, in fact most premises. People
 2 could only leave home in very rare circumstances, and it
 3 is just misrepresentative of the position for the
 4 defendants to suggest, as Ecclesiastical /Amlin do in
 5 their skeleton, that home working was encouraged where
 6 people could possibly work from home. It wasn't
 7 "encouraged"; it was required unless it was not
 8 reasonably possible to do so.

9 So we would say that the regulations did order many
 10 owners and employees not to access premises for their
 11 work. And this was all part of an indivisible and
 12 interlinked strategy. It wasn't piecemeal and it wasn't
 13 merely advisory; all aspects of the public authority
 14 response were targeting individuals and businesses in
 15 combination cumulatively over time, and culminating in
 16 26 March regulations. The language was imperative, and
 17 we say it wasn't merely advisory, it wasn't a matter of
 18 choice.

19 Finally on this topic, in relation to the
 20 defendants' reliance on the Leicester lockdown, which is
 21 relied on by Ecclesiastical /Amlin, for example, at
 22 paragraph 26.11 of their skeleton, the fact that the UK
 23 Government moved recently to implement a local lockdown
 24 we would say underscores the fact that it implemented
 25 a national lockdown in March.

1 The Leicester situation shows that the UK Government
 2 was capable or had the ability to impose a local
 3 lockdown, but in fact it chose in March to put in place
 4 a nationwide lockdown due to there being a nationwide
 5 disease, wrapped up with the need for a nationwide
 6 response. I won't go through them, but the Leicester
 7 regulations, which are at {K/22/1}, you will see if you
 8 skim read them, they are in much the same terms as the
 9 regulations that were implemented on 26 March, including
 10 the same restrictions on businesses, moving of persons,
 11 gatherings, et cetera. And a similar list of
 12 businesses, slightly adjusted but a similar list of
 13 businesses applied in that case.

14 That's what I wanted to say about the pandemic and
 15 about public authority action. I am going to just
 16 briefly address a couple of matters that interrelate
 17 with the issues I have just been covering, which are
 18 types of public authority action and disease policy
 19 triggers. They are addressed in our skeleton starting
 20 at paragraph 103 onwards, which is at {1/1/44}. The
 21 rest of the issues as to the meaning of "imposed" or
 22 "prevention of access" or "interruption" will be
 23 addressed in the context of the specific insurer policy
 24 wordings. It is really more to tell you what is in
 25 issue and what is not in issue than anything else at

1 this stage.

2 I will just pick up the points in relations to types
 3 of public authority action and the fact that the policy
 4 wordings require public bodies to take some form of --
 5 there are a number that require public bodies to take
 6 some form of action for the policy to over coverage, and
 7 they tend to be referred by way of differing
 8 terminology.

9 There doesn't seem to be any dispute that the UK
 10 Government is "government" within the meaning of, for
 11 example, Arch, Ecclesiastical and some of Hiscox's
 12 clauses; and a "governmental authority" for the purposes
 13 of RSA 4; a "public authority" for the purposes of
 14 Hiscox's disease clauses; a "competent public
 15 authority", Amlin and RSA 2; and a "statutory
 16 authority". So there is no dispute about that. All of
 17 the insurers, with those wordings, accept that the
 18 wording includes and therefore contemplates action by
 19 a government.

20 The FCA relies on that as supporting the case that
 21 these wordings were contemplating the sorts of wide area
 22 disease, dangers or emergencies that would be likely to
 23 engage a government's response. Some explicitly refer
 24 to government, others include government, but they are
 25 all contemplating an outbreak of infectious disease or

1 emergency or similar that engages the government, and
 2 that will be an important point when construing the
 3 policies and whether they would be expected to
 4 cover wide area disease.

5 The FCA isn't seeking to contend, for the purposes
 6 of establishing cover, that the government satisfies any
 7 triggers requiring action by a local authority, although
 8 the issue as to the meaning of a competent local
 9 authority arises on the Ecclesiastical exclusion clause
 10 and that will be discussed when we get to
 11 Ecclesiastical.

12 So apart from in one respect, it is agreed that all
 13 the public authority clauses relied upon cover UK
 14 Government action.

15 The only dispute for the court to decide is whether
 16 the UK Government is a "civil authority". Amlin 1 and
 17 Zurich, both types 1 and 2, require proof of action by
 18 the police and other competent local, civil or military
 19 authority.

20 Now, Amlin admits that the UK Government and
 21 parliament are a competent local civil or military
 22 authority if and when exercising authority over the
 23 location of the premises; that is paragraph 50 of their
 24 defence. But Zurich disputes it, on the basis that
 25 there is no reference to "government" in the clause, and

1 if the parties had intended cover to attach to the
 2 actions of government they would have said so. They
 3 contend that a "civil authority" is a reference, in
 4 effect, to the Health & Safety Executive or the Civil
 5 Aviation Authority or the Fire Service, but does not
 6 encompass national government.
 7 Now, we say Zurich is wrong not to admit this, and
 8 the FCA and Amlin are right. But I am not going to
 9 argue about that now; we will address it in more detail
 10 when we consider Zurich, as the issue only affects its
 11 wordings.
 12 The second part of looking at types of policy --
 13 LORD JUSTICE FLAUX: The Health and Safety Executive is a
 14 governmental body, is it not?
 15 MS MULCAHY: It is a governmental body.
 16 LORD JUSTICE FLAUX: It's not an NGO or something of that
 17 kind; it is an arm of government.
 18 MS MULCAHY: It is. The point that Zurich is making is that
 19 its body is below national government. So the
 20 government itself and parliament would not form within
 21 that. It would have to be bodies below that level. But
 22 as I said --
 23 LORD JUSTICE FLAUX: We will hear that argument in due
 24 course.
 25 MS MULCAHY: It will be argued in due course.

1 LORD JUSTICE FLAUX: I am currently unconvinced by that
 2 point.
 3 MS MULCAHY: The second point is action or advice. A number
 4 of the policies require action or advice by the relevant
 5 public authority. We rely on the actions that have
 6 previously been discussed, but starting from
 7 16 March 2020. So we list the actions we rely on in our
 8 skeleton at paragraph 69, which, so you have the
 9 reference, is {1/1/31}.
 10 Arch, for example, and RSA2 and RSA4, require action
 11 or advice. Arch does not dispute that any of the
 12 relevant government actions relied upon by the FCA fell
 13 within that definition.
 14 By contrast, RSA denies that certain matters were
 15 actions or advice, and in its skeleton it only admits
 16 that government orders that premises should close, which
 17 it describes or names the closure measures, and the
 18 instructions as to social distancing and staying at
 19 home, which it calls "the social distancing measures",
 20 are all action or advice. And it says everything else
 21 is not.
 22 We don't need to concern ourselves with anything
 23 before 16 March, because it is not being relied on by
 24 the FCA as having relevant interrupting effects. But
 25 there is an issue there, as to the status of, for

1 example, the Coronavirus Act, the designation of
 2 specified authorities to enforce the regulations, the
 3 extension of restrictions on 16 April et cetera, that
 4 seems to be in dispute.
 5 There are some other policies that just refer to
 6 "action", ie it is not action or advice, it is just
 7 action, being Ecclesiastical, Amlin 1 and 3 and the two
 8 Zurich policies, and there is a difference again of
 9 approach between the defendants.
 10 Ecclesiastical appears to accept that advice,
 11 instructions, guidelines, announcements, as well as
 12 legislation, in relation to churches all amount to
 13 action, and that appears to be confirmed by
 14 Ecclesiastical's skeleton argument at
 15 paragraph 120.4(c). So they would appear to be
 16 conceding that the government instruction on 23 March,
 17 that places of worship should close immediately, was
 18 action.
 19 Amlin also appears to accept that advice,
 20 instructions, announcements and legislation were
 21 actions, and that is confirmed in its skeleton at
 22 paragraph 135.2. It says:
 23 "The government acted when it issued advice or
 24 guidance and also when it made regulations."
 25 That is the FCA's case.

1 Only Zurich argues that "action" does not include
 2 advice or guidance. It says that in its defence at
 3 paragraph 39.2(a). The sole reason appears to be
 4 because the clause does not say so; and that position is
 5 maintained by Zurich in its skeleton. Again, because it
 6 is its only insurer arguing this, we will address that
 7 when we come to Zurich, rather than taking up time with
 8 it now.
 9 But the FCA's case is that in the context of public
 10 authority action, action and advice is overlapping, and
 11 that giving advice is an action, it is a thing, an act
 12 or thing done.
 13 That's all I wanted to say at the moment, simply to
 14 identify what is in issue and with whom.
 15 The final point is on COVID-19 and fulfilling
 16 disease requirements. You will see from the list of
 17 issues at paragraph 1, which is at {A/15/1}, it is
 18 common ground that COVID-19 fulfills the various disease
 19 requirements which are specified by ensuring provisions
 20 triggered by disease, including that it became
 21 a qualifying notifiable disease within the meaning of
 22 the various different wordings to that effect in England
 23 on 5 March, on 6 March in Wales, and on those relevant
 24 dates in other parts of the UK. And the FCA in this
 25 claim is not seeking to establish a trigger prior to the

1 disease becoming notifiable under the UK legislation .
 2 All I want to do for present purposes, and it is
 3 really as a matter of context when you are construing
 4 the policies , is just to note what this means, ie what
 5 it means for a disease to be a notifiable disease . It
 6 means for England it is one of the now 33 diseases on
 7 a list , the discovery of which triggers statutory
 8 obligations on doctors, on hospitals , on laboratories
 9 and local authorities to report the case of notifiable
 10 disease, or such an infectious agent. The local
 11 authorities have to report to national bodies, to the
 12 health protection authority , to Public Health England.
 13 Just to take you to the regulations relating to that
 14 at {J/11/11}, the explanatory note to the Health
 15 Protection (Notification) Regulations 2010, which
 16 provide the basis on which diseases can become
 17 notifiable , one can see there in the first paragraph
 18 that they place obligations on various persons to
 19 disclose information to specified third parties for the
 20 purposes of "preventing , protecting against , controlling
 21 or providing a public health response to the incidence
 22 or spread of infection or contamination".
 23 So it is a public health response. These are
 24 infection diseases which might spread and might lead to
 25 a public health response. The list on that date, to

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1 which COVID was added this year, is at page 8 of that
 2 document. Again, it is probably worth just to look to
 3 see the types of diseases that are being referred to.
 4 You will see there it includes cholera, malaria, plague,
 5 it includes I think SARS, smallpox, TB, et cetera .
 6 It is agreed between the parties , it is {C/9/2},
 7 Agreed Facts 5, that these are epidemic, endemic or
 8 infectious diseases , as stated in the Public Health
 9 (Control of Diseases) Act 1984, which is the enabling
 10 Act for the making of these regulations in 2010. As
 11 I said , the regulations have been amended this year to
 12 add COVID-19 and the virus SARS-CoV-2 to the list of
 13 notifiable diseases and causative agents. But all of
 14 the disease clauses referring to notifiable diseases are
 15 anticipating this sort of infectious disease .
 16 I am going to hand back now to Mr Edelman. Thank
 17 you.
 18 (12.13 pm)
 19 Submissions by MR EDELMAN
 20 LORD JUSTICE FLAUX: Yes, Mr Edelman.
 21 MR EDELMAN: My Lords, can I just add one final comment to
 22 what Ms Mulcahy has said, and it arises in relation also
 23 to defendants' argument about prevention, and whether
 24 what the government said insofar as it wasn't
 25 legislatively prohibited is prohibitive , and that is

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1 this :
 2 In times of emergency and crisis , the public
 3 understands the difference between what the government
 4 was telling them to do in March of this year , and
 5 exhortations like to eat more fruit and vegetables and
 6 drink less alcohol . Behind the government's
 7 announcement telling people what they must do was an
 8 appeal to comply voluntary in order to avoid or minimise
 9 the government being enforced to invoke the law. I want
 10 to say the fact that in a free society governments
 11 impose their will in this way, rather than operating as
 12 if is this was a Police State, is what marks us out as
 13 society where people realise that freedom comes with
 14 social responsibility . Insurance policies should be
 15 construed and applied in that context and not as if they
 16 were being pored over, as Mr Kealey would have it, by
 17 constitutional and human rights lawyers.
 18 My Lords, the next topic is principles of
 19 construction , and I can be very brief about this .
 20 Firstly , a few words about Chartbrook. It doesn't
 21 give the court free rein to rewrite contracts. The
 22 obviousness of an error is not to be judged from
 23 insurers ' perspective , particularly so where the claimed
 24 errors were the benefit of hindsight . The error must be
 25 one which would have been obvious to a reasonable reader

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1 without reference to events which occur after the
 2 contract had been entered into , and it must also be
 3 clear to the reasonable reader what correction to the
 4 language is necessary .
 5 MR JUSTICE BUTCHER: Mr Edelman, this is just RSA, is it?
 6 MR EDELMAN: My Lord, it does come in also with other
 7 insurers who say that, for example, their trends clauses
 8 ought to be read differently and so on. Where they say
 9 it is an obvious mistake not to apply our trends clause
 10 to something other than damage.
 11 LORD JUSTICE FLAUX: There is a difference, isn't there,
 12 between the sort of RSA point and the trends clause
 13 point? Because the trends clause point, in essence what
 14 is being said is: look, these business interruption
 15 insurances can only operate sensibly if there is
 16 a contractual machinery for calculation of loss, of
 17 which the trends clause forms a part. And they say: if
 18 we haven't said that "damage" includes all the insured
 19 perils , including non-damaged things, that has sensibly
 20 to be the construction the court should put on it ,
 21 because otherwise there isn't a contractual mechanism.
 22 How do you actually calculate your loss?
 23 I mean, that is the argument.
 24 MR EDELMAN: That is the argument, but if it's calculable --
 25 LORD JUSTICE FLAUX: Qualitatively it's a different sort of

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1 argument.

2 MR EDELMAN: It is, but it does require correction to the

3 policy, in the sense that the language as it stands --

4 LORD JUSTICE FLAUX: Yes, but correction that falls short of

5 rectification.

6 MR EDELMAN: Absolutely. That is why I mentioned

7 Chartbrook.

8 LORD JUSTICE FLAUX: Yes. Well, Chartbrook is a bit of

9 a busted flush when it comes to rectification.

10 MR EDELMAN: It is not rectification, that is --

11 LORD JUSTICE FLAUX: No, it's all right, I'm only just

12 making the point that ...

13 MR EDELMAN: Yes.

14 Contra proferentem. Not a lot to say about this,

15 I think it is common ground. When the proferens relies

16 on wording which is genuinely capable of two meanings,

17 and the intended meaning cannot reliably be discerned by

18 any other contextual factors, the court is entitled and

19 bound to construe against the proferens.

20 I hope that is uncontroversial. That is the only

21 reliance we intend to place on contra proferentem, but

22 that is it.

23 Then one more topic on which I want to say a little

24 bit more, which is the factual matrix point made by

25 insurers. It is in the skeleton on construction at

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1 {1/5/5}. If we could have that up, please. It is their

2 reliance on The Kleovoulos of Rhodes for the proposition

3 that Orient-Express is settled law, and that policies

4 should be construed against that background.

5 Having recently had to argue about the case and the

6 clause considered in The Kleovoulos of Rhodes in The

7 B Atlantic, I think it is important to put some context

8 on what Lord Justice Clarke was dealing with in that

9 case and what he said.

10 Firstly, as my Lords will know, it concerned

11 a standard Institute marine insurance clause for

12 worldwide use.

13 Secondly, the Court of Appeal decision on the

14 clause, The Anita, dated back to 1971.

15 Thirdly, and if we go to {K/111/10}, please, at

16 paragraph 45 in the second column, you will see that in

17 the judgment of Lord Justice Clarke as he then was, he

18 refers to the fact that Arnold on Marine Insurance in

19 1981 had treated the clause as having a settled meaning,

20 and he noted the authors were then Sir Michael Mustill

21 and Mr Jonathan Gilman, and also notes that the

22 Institute clauses were reviewed in 1983 and the relevant

23 words were left unchanged. That is in the light of The

24 Anita having been decided in 1971.

25 Then in paragraph 46 he moves on to recite the fact

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1 that Arnold treated the clause as having a settled

2 meaning, taking into account also the review of the

3 clauses that there had been, and that is paragraph 46.

4 Then The Kleovoulos of Rhodes itself, the judgment

5 is in 2003, that is 32 years after the previous decision

6 of the Court of Appeal on the point, and with the

7 meaning of the clause having been treated as settled by

8 distinguished authors of the leading text on marine

9 insurance and by those responsible for reviewing it in

10 1983 in the context of its international use.

11 It is also important to bear in mind the test that

12 the court applied, at paragraph 44 in column 1 of the

13 page that is on the screen:

14 "So I turn briefly to the question of whether the

15 meaning of clause 4.15 should be regarded as settled."

16 And he refers to Re Hooley Hill Rubber."

17 If we could go back to paragraph 27, that is on

18 page 8, please {K/111/8}, and you will see in

19 paragraph 27 there is a quotation from Hooley Hill

20 Rubber in the middle of the paragraph, and that was

21 referring to a decision, Stanley v Western, it is in

22 fact a decision in 1868, which had stood for 50 years,

23 and that was the sort of decision that was being

24 considered in Hooley Hill Rubber, which

25 Lord Justice Clarke considered himself to be applying

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1 when he went on to conclude that the meaning of the

2 clause was a matter of settled law.

3 Insofar as this is intended, as it appears to be, to

4 support an argument that Orient-Express should be

5 accorded the same status as The Anita was in The

6 Kleovoulos of Rhodes, we would submit it is utterly

7 misguided.

8 A number of reasons for that. Firstly,

9 Orient-Express only dates back to 2010. Unsurprisingly

10 perhaps, the courts haven't considered the point in the

11 meantime. It's a first instance decision. Ms Mulcahy,

12 later on when she comes to the law on causation, will

13 tell you what happened in relation to the appeal, but

14 there is the perhaps distinct possibility that insurers

15 fought off the pursuit of an appeal because they wanted

16 to bank the decision in order to deter future

17 policyholders. And it has not met with any positive

18 approval in textbooks from commentators; on the contrary

19 it has at the very least been questioned.

20 I don't want to go at this stage into the rights or

21 wrongs of the questioning; this is purely as a question

22 as to whether these policies should be construed against

23 the background of settled law.

24 If I could remind my Lords firstly of what we have

25 said in our skeleton at 306, that is {1/1/120}. There

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1 we mention the criticism of it in Colinvaux and in
 2 Riley, or the doubt expressed about it. Then, perhaps
 3 unsurprisingly because I suspect it is the same author,
 4 Colinvaux and Merkin at {J/148.1/11} to page 12. Thank
 5 you.
 6 If we move on to 12, you will see he deals with
 7 Orient-Express, you can see it on the bottom left-hand
 8 corner. If I could just move on to page 12, please.
 9 You will see that at the foot of page 12 he said the
 10 reasoning -- at the end of this passage it says:
 11 "Indeed, the reasoning renders the primary cover
 12 under business interruption policies of little value
 13 where a catastrophic event has affected both the
 14 assured's premises and the surrounding district."
 15 Hardly a ringing endorsement.
 16 Finally, at {K/194/12}, just about legible, I think,
 17 there is the one reference to Orient-Express, that is
 18 the only reference in Professor Clarke's book to
 19 Orient-Express, it is in the footnote; and having set
 20 out the rule of proximate cause in the first sentence of
 21 25.3, in England the proximate cause is said to be the
 22 efficient or dominant cause, footnote 1 refers to
 23 Leyland Shipping, and in the third line it is:
 24 "See (f)., the application of the 'but for' test for
 25 factual causation (tort) to a business interruption

1 claim arising out of hotel damage in New Orleans due to
 2 Hurricane Katrina."
 3 Without reference to, one can see, insurance
 4 precedents such as the Leyland case.
 5 So that is the grand status that Orient-Express was
 6 accorded in Professor Clarke's book and it is, again,
 7 not entirely complimentary.
 8 Then we have additional factors, the US courts have
 9 taken a different approach.
 10 Also, what you will see when we come to the cases is
 11 that on the ordinary causation approach, the arguments
 12 that we are going to advance before the court, we would
 13 submit, were not fully aired. But in any event we say
 14 a decision is wrong. Whatever the rights and wrongs of
 15 Orient-Express, which we will come to, and we can live
 16 with it by distinguishing it as well as arguing that
 17 it is wrong, seeking to uphold its application on the
 18 basis of settled law principles is nothing short of
 19 hopeless.
 20 One other aspect on this, Argenta advances its own
 21 separate legal principles, and this is at {I/11/12}, and
 22 it seems to argue there that its policies were sold
 23 through brokers, and so the policies should somehow be
 24 construed and applied in accordance with Orient-Express,
 25 even if it does not qualify as settled law presumably,

1 and even if this court were to distinguish, qualify or
 2 not follow Orient-Express, simply because these policies
 3 were sold through brokers who are then taken to have
 4 known of Orient-Express.
 5 We submit that is an unorthodox approach to
 6 construction, which the court should not adopt, to imbue
 7 policyholders and indeed brokers, often just offering
 8 business through an internet portal, with full knowledge
 9 of all the implications of a first instance decision
 10 that merits, for example, only a passing and critical
 11 reference in a footnote to Professor Clarke's work is
 12 fanciful.
 13 So we submit that one approaches the construction
 14 and application of these clauses as a matter of
 15 construction and law. Orient-Express is either relevant
 16 or it isn't. If it is relevant, then we will argue it
 17 should either be distinguished or overturned, but it
 18 can't come into the construction exercise.
 19 My Lords, that is all I wanted to say about
 20 contractual construction. If I could now move on to
 21 prevalence.
 22 As you will have seen, there are policies which
 23 require the policyholder to prove the presence of the
 24 disease within a certain distance from the premises, for
 25 example 25 miles or 1 mile. The issue is how should the

1 policyholder prove that, and the court ruled that there
 2 should be two issues determined at the trial: firstly,
 3 the types of evidence on which the policyholder should
 4 be entitled to rely; and secondly, assuming that it is
 5 the best evidence, would the evidence on which the FCA
 6 has relied prima facie be sufficient to discharge the
 7 burden of proof.
 8 I will deal with those issues in turn. But as
 9 a preliminary point, the defendants appear, particularly
 10 this is in the Ecclesiastical /Amlin skeleton, which is
 11 adopted by other defendants, that we are seeking to
 12 prove somehow that the Imperial Cambridge analysis is
 13 the best evidence available. That is not the case. We
 14 simply seek to show, in accordance with the court's
 15 ruling, that estimates such as the Imperial analysis or
 16 the Cambridge analysis are a type of evidence on which
 17 a policyholder should be entitled to rely; and, of
 18 course, assuming that that is the best evidence that is
 19 available, we then say that it is prima facie sufficient
 20 to discharge the burden of proof. But we don't seek to
 21 positively prove that it is a type of evidence which the
 22 court would be bound to accept at this stage, without
 23 anything more.

24 MR JUSTICE BUTCHER: You having made that clear, how much is
 25 actually in issue on this?

1 MR EDELMAN: There are some limited issues, my Lord, and
 2 I just wanted to go through what those issues are.
 3 We have got the NHS death data, and that is the
 4 first one.
 5 The parties are agreed that the NHS data showing
 6 people who tested positive and died is available. And
 7 they agree, and this is in the agreed facts, that if
 8 there is only one hospital in a particular trust and
 9 that hospital is in the relevant policy area, then that
 10 shows that there was the disease in the area. That is
 11 paragraph 37A of Agreed Facts 3 and we don't need to
 12 turn it up.
 13 The defendants have admitted that certain uses of
 14 that data is permissible.
 15 QBE has admitted that form of evidence may be used;
 16 that is their defence paragraph 35.2.
 17 RSA, the defence of which other defendants have
 18 adopted, has admitted that it may be used where the NHS
 19 trust operated only one hospital in the relevant policy
 20 area; that is their defence at 21(b). But what they say
 21 is that there is this issue with the timing. They say
 22 that you can't rely on it as showing the presence of
 23 COVID on a particular date. They argue that the data
 24 only shows that at some point the patient tested
 25 positive for COVID, died in hospital and, they say, that

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1 person may have been in hospital for COVID, recovered
 2 and then died of something else.
 3 Well, we say firstly it is sufficient to show that
 4 there was a case of COVID at some point in the recent
 5 past, the limited timeframe in question being March, and
 6 that would be sufficient for the policy triggers. But
 7 secondly and in any event, I mean this really is
 8 clutching at straws. Their premise is someone caught
 9 COVID in March, within the same month recovered from it
 10 in hospital and then died from something entirely
 11 unconnected; and for that reason, they say that this
 12 data is unreliable as to date.
 13 Well, our submission --
 14 LORD JUSTICE FLAUX: Isn't this one of the reasons why there
 15 has been a query about the Public Health England death
 16 data? Because they are based upon particular
 17 assumptions as to people having tested positive at some
 18 point in the past, and then, as it were -- I mean, I
 19 follow your point that if somebody has caught it and
 20 been very ill with it, you might say well it is unlikely
 21 that they then go and die of something else, if they are
 22 that ill. But I mean this is part of the general
 23 discussion, isn't it, about the reliability of the data?
 24 Which really we can't trespass into, I don't think, not
 25 on the evidence we've got at the moment anyway.

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1 MR EDELMAN: My Lord, all I am saying is that the test data,
 2 the evidence of deaths, in relation to someone who was
 3 tested positive, in a hospital, on a given date, is
 4 evidence that COVID was present in the relevant policy
 5 area. We don't need to prove that the death was caused
 6 by COVID. So that is not what we are proving. So
 7 I take my Lord's point entirely.
 8 LORD JUSTICE FLAUX: I follow the point that if you have got
 9 evidence that somebody tested positive, then you have
 10 the presence of the disease and it is neither here nor
 11 there as to whether that particular person recovered or
 12 not.
 13 MR EDELMAN: Yes. Whether the hospital data is right in
 14 ascribing COVID as a cause of death is not the point we
 15 are getting at. We are just using the death data to
 16 show that it was present on a date. And what they are
 17 saying is: well, they may have died of something else.
 18 Fine.
 19 LORD JUSTICE FLAUX: So what, you say.
 20 MR EDELMAN: So what? We can still use the death data,
 21 which records that someone was positive for COVID, as
 22 evidence that they had COVID.
 23 It may be that the defendants could say: well, this
 24 person could have had COVID in some other relevant
 25 policy area, travelled to the hospital, being ill with

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1 something else, having recovered from COVID, and died.
 2 If they are going to exclude the data for that rather
 3 far-fetched case, we would say that is a situation where
 4 the court ought to say, well, the policyholder can rely
 5 on this death data, but of course it would always be
 6 open to an insurer to disprove the validity of the data.
 7 We are not asking for the court to say that this sort of
 8 data is conclusive, but that this sort of data is the
 9 type of data on which a policyholder should be entitled
 10 to rely.
 11 MR JUSTICE BUTCHER: If the question is: if this is the best
 12 evidence, can a policyholder rely on it, that may in
 13 a way answer itself, may it not?
 14 MR EDELMAN: Exactly. I mean that is the second question,
 15 my Lord.
 16 The first point is: can we get through the hurdle of
 17 showing that this is a type of evidence on which we are
 18 entitled to rely? And we say, this death data, yes.
 19 Then the next question is: if that is the best
 20 evidence that is available, does the court say, "Well,
 21 if that's the best you have got it's rubbish, it goes in
 22 the bin" or does the court say, "If that were to be the
 23 best evidence that was available, that would be
 24 sufficient, the type of evidence that would be
 25 sufficient to discharge the burden of proof?"

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1 We all know there are cases that raise a shipping
2 case: don't know why, so it must have been a Russian
3 submarine.
4 MR JUSTICE BUTCHER: The Popi M.
5 MR EDELMAN: I was struggling for the name, sorry. Yes,
6 it is The Popi M. I had a senior moment forgetting the
7 name. The court would say, "If is that the best you can
8 do, that is not good enough".
9 LORD JUSTICE FLAUX: That is very rare.
10 MR EDELMAN: That is very rare.
11 LORD JUSTICE FLAUX: That was the argument that failed, as
12 I recall bitterly, in The Kapitan Sakharov.
13 MR EDELMAN: Yes.
14 LORD JUSTICE FLAUX: You are entitled say: well, this is
15 evidence of the disease being present in a particular
16 policy area.
17 MR EDELMAN: Yes.
18 LORD JUSTICE FLAUX: There may be other sorts of evidence
19 which could also be relied upon. An obvious example is
20 if you were looking at within one mile of 10 Downing
21 Street then you would rely upon the fact that the
22 Prime Minister contracted COVID. There could be other
23 forms of evidence, but you say this is, as it were, a
24 sort of base of evidence which policyholders should in
25 principle be entitled to rely upon, although it is

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1 always open to insurers to demonstrate that it is
2 unreliable for whatever reason.
3 MR EDELMAN: Yes, in a particular case.
4 LORD JUSTICE FLAUX: In a particular case, yes.
5 MR EDELMAN: That is that data. Then we come to the Office
6 for National Statistics death data, and that shows
7 deaths in weekly reports and does so by local authority,
8 health board and place of death.
9 The parties are agreed, subject to one point I will
10 come to, that a policyholder can rely on this type of
11 evidence. It won't identify which day in the week
12 somebody had the disease, but the parties are agreed
13 that it will show at least one case of COVID during the
14 period immediately prior to the week in question when
15 the figures are issued. There may be disagreements as
16 to what counts as immediately prior, but I don't think
17 we need to go into that.
18 The qualification from the defendants is: what if
19 the local authority or health board is partly in the
20 RPA? Then, they say, you can't prove presence based on
21 this data alone; which appears to be a concession that
22 they can rely on the ONS data in combination with some
23 other evidence. But it is this straggling issue that we
24 now need to move on to, and it applies also where you
25 have got, for example, a hospital trust with more than

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1 one hospital in an area, and you have got a record for
2 the trust but that trust area extends beyond the
3 relevant policy area.

4 You then have cases, there are some cases with
5 a 25 million radius, and if I can just -- you have
6 probably seen it in our skeleton, but {1/1/77} and
7 page 78. It is not coming up. That shows how large
8 some of these 25-mile areas can be, and my Lords will
9 have seen it in the skeleton argument.

10 What we would submit is that what we can do is to
11 apply to these cases a -- firstly, I will deal with the
12 weekly cases; we can use that for a period of time,
13 given the period of infection, so my Lords have in the
14 agreed facts -- and I will give you the references again
15 to speed things along, it is footnote 21 and 24 of
16 Agreed Fact 3. An individual will be infectious for
17 a period of time; that is seven to 12 days the
18 infectious period is said to last for in moderate cases,
19 up to two weeks on average in severe cases, so the
20 average period of infection is about ten days.

21 So we are entitled to rely on the data for a spread
22 of period. The average period of infection is ten days,
23 and so we say we should be able to rely on cumulative
24 totals, and so the policyholder can rely on the window
25 of cumulative cases leading up to the date of its claim.

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1 I think what the defendants are saying is you have
2 to prove a case on a particular day. We say, well
3 actually you can take these statistics, in particular,
4 for example, the weekly statistics, but all other
5 reported cases, and they give you a picture for
6 a period.

7 As I said, you then get to the question of --
8 LORD JUSTICE FLAUX: I am not sure I am following the point
9 here. If you take, for example, a period beginning with
10 Monday 16 March, if you have got ONS death data for the
11 week ending Friday 13 March -- sorry, for that week,
12 that week, in other words, the week ending 20 March, and
13 the average infection period is ten days, then it is to
14 be inferred, isn't it, that the people who died of COVID
15 during that week were infected with it at the beginning
16 of that week on 16 March?

17 MR EDELMAN: Whether they died with it, they died having it.
18 We don't need to worry about the cause of death. If
19 they died having it they must have had it for at least
20 a period of ten days.

21 LORD JUSTICE FLAUX: A period of at least on average ten
22 days.

23 MR EDELMAN: Yes, and if they were severe enough to be in
24 hospital they probably had it for at least two weeks.

25 LORD JUSTICE FLAUX: For longer, yes.

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1 MR EDELMAN: So what we say is that you can spread the
 2 figures backwards from the date, and that includes the
 3 weekly totals, because the defendants make a point, they
 4 say that the weekly totals don't tell you what day the
 5 person was infected, and we say, well, you can spread
 6 that across the period.

7 LORD JUSTICE FLAUX: Yes. Okay.

8 MR EDELMAN: I think I may have jumped ahead. It may have
 9 been my fault. More haste less speed. I was trying to
 10 jump forward a bit and missed out that point. But that
 11 is an important point because they tried to tie us to
 12 the particular date of the data as opposed to spreading
 13 it backwards by reference to the period of infection.

14 Now we come to averaging and whether averaging is
 15 a methodology that a policyholder should be entitled to
 16 use. That applies to ONS death data across a local
 17 authority area, which is larger than the relevant policy
 18 area; reported cases across a regional local authority
 19 area, again larger than a relevant policy area; and of
 20 course again reported cases uplifted by an undercounted
 21 ratio, which I will come to in a moment.

22 The defendants have objected to even distribution
 23 and we recognise that and we have tried to accommodate
 24 that by accepting that the averaging should operate on
 25 the basis of population weighting.

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1 Now, if one takes for example -- if I can go now
 2 please to {1/1/81} -- a picture of Cornwall. So that is
 3 a 25-mile radius from a central point in Cornwall.

4 What one can do is identify the number of reported
 5 cases up to the date of the claim. But that will be,
 6 let's assume that is for Cornwall as a whole, because
 7 Cornwall is a relevant authority area. You can see then
 8 that the relevant policy area is smaller than the
 9 reporting area.

10 You can then take the population of Cornwall, and
 11 the population within the relevant policy area, using
 12 publicly available data showing population by postcodes
 13 and combining the population of those postcodes, and
 14 then you can find the proportion of the population in
 15 Cornwall that is within the relevant policy area, and
 16 then average the number of reported cases. If there was
 17 only one reported case in all of Cornwall in a given
 18 period you might say well you can't prove it. But if
 19 you have 100 or a 1,000, that is likely to tell you on
 20 the balance of probabilities overwhelmingly on the
 21 balance of probabilities that there would have been at
 22 least one person and probably very many people in the
 23 relevant policy area with COVID.

24 We say this is a type of methodology which
 25 a policyholder should be entitled to use.

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1 Once again, in every case it would be open to an
 2 insurer to say that for some reason this methodology is
 3 inappropriate: let's look at the numbers and they can
 4 all be accounted for by a care home which is outside of
 5 the relevant policy area, and that accounts for
 6 100 per cent, or such a high proportion of the cases,
 7 reported cases, that makes your analogy inaccurate.

8 We are not asking you to determine that. All we are
 9 simply saying is that weighted averaging should be
 10 a type of methodology on which policyholders can rely.

11 We say that is a methodology that can be used with
 12 all this data, wherever necessary, as a type of
 13 methodology. It is sufficiently sound to pass muster as
 14 a valid methodology. That doesn't mean that it is going
 15 to give the right answer in every case, but it is a type
 16 of evidence.

17 Then the next issue is the undercounting ratio.
 18 Again is it appropriate for a policyholder to rely on
 19 the type of evidence that the Imperial and Cambridge
 20 analysis has produced as a type of evidence that would
 21 be an acceptable form of methodology.

22 MR JUSTICE BUTCHER: Is that in dispute, Mr Edelman? As
 23 opposed to whether that study is right; whether that
 24 type of evidence is right, is that in dispute?

25 MR EDELMAN: What the defendants say is, they say that in

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1 order to use this sort of methodology the policyholder
 2 has to positively prove that it is reliable. We say
 3 that is setting the bar far too high when one bears in
 4 mind that what we are dealing with here is what will be
 5 the unknowable. We will never know how many people
 6 actually had it. All we can do is to look to people
 7 like Imperial and Cambridge to come up with models to
 8 give us estimates. And they will never ever be more
 9 than that; they will be estimates.

10 So what we say is it is sufficient if the report is
 11 relevant, in the sense that it is addressing the right
 12 issues at the right timeframe, and the defendants have
 13 come up with a report from May. We say that is the
 14 wrong timeframe. It has got to be a relevant report
 15 which is addressing the prevalence of COVID in the UK
 16 in March. And it has to be from a suitably qualified
 17 institution.

18 That is the sort of evidence that a policyholder
 19 should be entitled to rely upon. Whether it is reliable
 20 evidence would then be tested in the case. But to
 21 require a policyholder to prove as a sort of threshold
 22 point that it is reliable is, we say, we submit, setting
 23 the standard too high.

24 The type of evidence the court should set, all you
 25 should say at the moment is not to apply any qualitative

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1 standard to it other than it should be relevant and from
2 a suitably qualified institution .

3 So not a journalist making back of the cigarette
4 packet calculation , but from an institution that has
5 recognised expertise and qualification in doing this
6 sort of study.

7 They are bound to differ , and to say that it must be
8 reliable is to expect the impossible . They are bound to
9 come up with different results . What the policyholders
10 will be seeking to do in this case is not to provide an
11 exact number, but to give , if it was proving it , to give
12 the court a ballpark figure of what is meant by "much
13 higher ", which is what most of the defendants accept,
14 that the number of cases was much higher than the number
15 of reported cases .

16 LORD JUSTICE FLAUX: Going back to your point about
17 Cornwall, for example, I suppose if it were the case
18 that it was only one reported case for the whole county
19 on the relevant date, and if the undercounting evidence
20 is that in fact that is an underestimate to the tune of
21 a 1,000%, so there are in fact ten cases, then you say
22 the policyholders should be entitled to rely upon that
23 in principle at least , and it would always be open to
24 the insurers to rely upon their own expert evidence to
25 say, well , actually it has only been undercounted to the

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1 tune of 200%; there are only two cases; and they were
2 both in a care home outside the policy area .

3 MR EDELMAN: Exactly. They would then be able to do that
4 for their evidence and say when you are multiplying up
5 from that number you have got to then focus on where
6 they were because it is more likely there would be
7 a cluster around the reported case, for example.

8 LORD JUSTICE FLAUX: Yes.

9 MR EDELMAN: All on the individual facts; none of that
10 closed off from insurers at all . We are just saying
11 that there is a starting point . Let's say more
12 realistically you had a more significant number in
13 Cornwall, you uplift that by the undercounting factor
14 according to a relevant and suitably qualified
15 institution 's prediction , and then do the averaging
16 process to see where that gets you.

17 In the vast majority of cases it is going to get you
18 to such a high number anyway that whether it is 1 in 100
19 or 1 in 50 is not going to make any difference .

20 LORD JUSTICE FLAUX: No.

21 MR EDELMAN: That is why we submit that the court ought not
22 to put up what the defendants want you to put up, some
23 sort of qualitative burden, before this evidence passes
24 muster.

25 A claimant should not have to prove that some

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1 respected scientific institution has produced a reliable
2 result . They can just produce the result and that
3 should be of itself a type of evidence on which the
4 parties can rely .

5 MR JUSTICE BUTCHER: Mr Edelman, I am sorry, I am no doubt
6 repeating myself. If there is an estimate by
7 a reputable institution and then there is nothing said
8 against that, then one might assume that that was likely
9 to be concluded to be reliable . Whereas if there was
10 something said to contradict it on reasonable grounds
11 then one might say that it wasn't reliable .

12 MR EDELMAN: Precisely, my Lord, and I don't disagree with
13 that. But I think what we balk at is that the
14 defendants appear to require the claimant not just to
15 present the evidence and say, well, look there is
16 nothing else that contradicts it; here are three
17 studies, they are all in the same ballpark; they have
18 got to prove reliability . You have actually got to call
19 scientific evidence to justify the methodology used by
20 the institution and have it subjected to being as it
21 were tested, in inverted commas, by the defendants
22 really as they have tried to do -- and I appreciate they
23 have not been able to get their own expert evidence --
24 but as they have tried to do in this litigation .

25 So that's what we say about the exercise . Now

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1 I have not got much more to say but, my Lords, if you
2 would allow me perhaps five minutes more I can finish ,
3 but I am happy to do it at 2.00.

4 LORD JUSTICE FLAUX: If you think you can finish this topic
5 in five minutes let 's go on and finish it .

6 MR EDELMAN: Because the next stage is whether, if this is
7 the best evidence that a claimant can provide, all the
8 types of evidence that we have been discussing , if it
9 was the best evidence that was available should it be
10 sufficient to discharge the burden of proof, then in the
11 Equitas and R&Q case methodology shift the burden,
12 whether one describes that as the evidential burden or
13 the legal burden is semantics, we all know what we mean,
14 shift the burden on to the insurers to prove something
15 to the contrary, show something to the contrary .

16 Now, the difference we face in this situation from
17 the Equitas case is that was a private dispute with
18 a privately commissioned report, where obviously there
19 may have been an issue as to reliability given it was
20 commissioned by one of the parties ; but here we are
21 dealing with either publicly available information or,
22 having got through the qualifying hurdle of being
23 a relevant and suitably qualified institution , an
24 independent analysis of the information . We submit if
25 that was the best that was available , that ought to be

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1 treated by the court as sufficient evidence, recognising
2 that we are in the realms of something that will never
3 be known, and cannot ever be known.

4 That is an important factor and it was also, in the
5 Equitas case, an important factor there because the
6 practicality of taking apart the LMX spiral to work out
7 individual balances was just not on.

8 So the court accepted that this is practically
9 impossible and in those circumstances you find
10 a substitute. Ordinarily in litigation, obviously, in
11 private disputes people would have privately
12 commissioned reports. This is a public issue, with
13 publicly available reports. We are not asking you to
14 say anything about any individual report being good or
15 bad; we are simply saying that if, for example, the
16 Cambridge analysis was the best evidence that was
17 available because no other institution either could try
18 it or had tried it, then that ought to be sufficient for
19 a policyholder.

20 MR JUSTICE BUTCHER: That almost boils down to saying: the
21 best evidence is the best evidence. I mean, you are not
22 asking us to say anything specific about this study,
23 merely, as I understand it, you are saying that if this
24 is the best evidence then it should be sufficient.

25 MR EDELMAN: Yes. One could say, my Lord, that in some

1 situations, and this goes back to The Popi M, if that is
2 the best you have got, if that is the best evidence that
3 you have got available, it is simply isn't enough.

4 MR JUSTICE BUTCHER: I understand.

5 MR EDELMAN: That is the only question I am asking the court
6 to address. Because the court could say: well,
7 Mr Edelman, if the Cambridge analysis on undercounting
8 ratio is the best you have got, then for reasons A, B, C
9 it's not good enough for a court to treat as sufficient
10 evidence. So it is a very limited exercise.

11 LORD JUSTICE FLAUX: It always being open to the insurer in
12 any individual case to demonstrate, for whatever reason,
13 the evidence is unreliable.

14 MR EDELMAN: Yes. That is why -- perhaps it was a clumsy
15 use of words, but we thought it was apposite; that is
16 why we referred to it as a rebuttable presumption. That
17 if the application of the undercounting ratio to the
18 reported cases gives you a certain number, that is
19 a rebuttable presumption as to what the number was,
20 assuming you have produced the best evidence, but it is
21 always rebuttable.

22 LORD JUSTICE FLAUX: Yes, okay.

23 MR EDELMAN: My Lord, those are the submissions I make on
24 this topic. Obviously we seek declarations about this,
25 but it may be that once the parties have got the court's

1 ruling it will be easier to get the text of the
2 declarations then, because then we can understand
3 precisely what it is that you have said.

4 LORD JUSTICE FLAUX: Okay. Is that a convenient moment
5 then, Mr Edelman?

6 MR EDELMAN: Yes, of course.

7 LORD JUSTICE FLAUX: We will break now until 5 past 2.

8 MR EDELMAN: Then I will start with causation after that.

9 LORD JUSTICE FLAUX: Okay. We probably need an hour off
10 before causation, Mr Edelman.

11 See you at 5 past 2.

12 (1.06 pm)

13 (The short adjournment)

14 (2.05 pm)

15 MR EDELMAN: My Lords, causation.

16 Mr Kramer, who has done a huge amount of work on
17 this, and for his assistance I am very grateful,
18 modestly did not want me to call this the
19 agreement-centred approach to causation, because that
20 was the title of an article he wrote that was adopted by
21 Lord Hoffmann in The Achilleas, but it is an appropriate
22 title and an appropriate way of introducing the topic,
23 because it is fundamental to what the court is being
24 asked to decide. It is not being asked to decide how
25 extra contractual rules of causation work in tort, or

1 for breach of contract; it's not being asked to
2 disapply, rule on or modify the rules of proximate or
3 "but for" causation as they apply to the law of
4 obligations. What it is being asked to do is rule on
5 their application within the confines of specific BI
6 insurance policies.

7 Of course, the causation test that you are going to
8 be applying is a creature of those policies, it derives
9 its vitality from them. It therefore must be shaped by
10 construction of the parties' intended causation
11 principles, as revealed by the language and the apparent
12 commercial purpose of the policies.

13 The defendants don't seek to like this very much.
14 Amongst other things, they refer to the doctrine of
15 insurance being to hold harmless; I will come to what
16 that means in due course. But they say that because the
17 remedy is in damages for failing to hold harmless, you
18 have to ask what the position would have been but for
19 the breach. They submit, therefore, that proximate
20 cause and other doctrines can cut down on the scope of
21 recovery, but against the backdrop of the "but for" test
22 having been satisfied. But that, with respect, does not
23 resolve the questions that are before the court or limit
24 the role of construction in this case.

25 The scope of the indemnity is determined by what

1 loss or damage the indemnity protects against, against
2 what is it that the insured is to who be held harmless.
3 That is a question of construction. There is no magical
4 additional principle of ascertaining the insured peril,
5 although the insured peril may play a role in
6 identifying the contractual intention; the talismanic
7 term that they deploy, "insured peril", can't ward off
8 the task of ascertaining from the words used what was
9 intended both as to cover and as to causation.

10 Extra contractual principles of causation would only
11 apply to the question of what loss was caused by the
12 failure to hold harmless. In other words, the failure
13 to hold harmless against the loss resulting from the
14 interruption. But the nature of the indemnity doesn't
15 mean that damages are at large for a failure to hold
16 harmless. So we therefore submit that the lengthy
17 discussion of non-insurance causation cases and
18 principles, as they apply to the causation requirements
19 for these BI policies, is something that misses the
20 mark.

21 But there is a certain degree of common ground
22 between the parties, because the defendants impress on
23 your Lordships that the principles of construction can
24 be derived from the intentions of the parties to the
25 contract, and they say that the commercial context is

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1 the key determinant of the causation question. We don't
2 disagree. Common sense, which is often deployed in
3 relation to causation, only comes into play once you
4 have set the legal parameters for its operation by
5 reference to the contract.

6 The obvious example of that is *Stansbie v Troman*,
7 where ordinarily one might expect the intervening act of
8 a third party burglar to break the chain of causation.
9 But it didn't, because the contract was for the workman
10 to exercise reasonable care, which included reasonable
11 care in securing the premises when he left for the day.
12 So the contractual context applied.

13 My Lords will have seen in the defendants' skeleton
14 on this topic reference to what Lord Hoffmann said in
15 the *Environment Agency* case. I can give you the
16 reference to that, it is their paragraph 22. We agree.
17 Causation involves setting the context in which the
18 causation test is being applied. Primarily that is
19 a legal context, but it is also a contractual context,
20 and more importantly a contractual context when one is
21 dealing with insurance.

22 I just want to deal for a moment with the concept of
23 an insured peril and what that all involves.

24 Now, my Lords will be familiar, section 3 of the
25 Marine Insurance Act defines "maritime perils" as things

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1 like perils of the sea, fire, war risks. These are the
2 perils that may cause loss of or damage to the vessel or
3 cargo.

4 The purpose of a policy of insurance insuring
5 against those perils is to indemnify the insured against
6 economic loss caused by the loss of or damage to the
7 vessel or cargo, caused by those perils.

8 What does "hold harmless" mean? Well, in my
9 submission the most accurate summary of that is by
10 Sir Peter Webster in *Callaghan v Dominion*, {K/82.1/4}
11 for the extract of that case.

12 This is what he said in the second column:

13 "In my respectful view His Honour Judge Kershaw
14 misunderstood ... [As read] ... or declining to apply the
15 dictum of Lord Goff."

16 Then a few lines down he says:

17 "Expressions such as 'to ensure against' or 'save
18 harmless from loss' may be capable of misleading. It
19 seems to me that the best way to define an indemnity
20 insurance is that it is an agreement by the insurer to
21 confer on the insured a contractual right which
22 prima facie comes into existence immediately when loss
23 is suffered by the happening of the event insured
24 against, to be put by the insurer into the same position
25 in which the insured would have been had the event not

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1 occurred but in no better position."

2 That must be an economic position. The insurer is
3 not rebuilding the vessel that is at the bottom of the
4 ocean. The reinsurer is putting the insured in the same
5 economic position in which he would have been had the
6 loss not occurred. One can see an example of a
7 peril-based cover, unusual as it is these days in these
8 forms of policy, but it is in one of the RSA's policies.
9 My Lords can see it at {B/17/17}, if that could be put
10 up on the screen, please.

11 You will see that it says:

12 "We will indemnify you against damage to the
13 property at the premises described in each item in this
14 schedule caused by the following ... insured perils ..."

15 We will come back to these insured perils because
16 how this all works and how it ties in with trends
17 clauses is going to be an important part of the
18 analysis.

19 Now, the defendants are very keen in their causation
20 case to say that what one takes out for the purposes of
21 the counterfactual is "the insured peril". Now, the
22 public authority denial of access type clauses -- and
23 I hope my Lords' reading is sufficient for me to use
24 those shorthand references -- although they acknowledge
25 and aver that the loss or interruption or interference,

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1 as the case may be, has to be caused by the combination
2 of matters identified in the clause, they then
3 cherry-pick the bit out of the clause that it suits them
4 to cherry-pick as being the insured peril, and leave the
5 rest for the purposes of the counterfactual.

6 As I will demonstrate to you later on in my
7 submissions, they are not always consistent in what they
8 cherry-pick.

9 For reasons both of inferred contractual intention
10 and law, we say that approach is wrong. You can't pick
11 and choose. If the "insured peril" is the appropriate
12 term to use and your appropriate reference point, and it
13 is, we say, it is not an entirely inapposite label to
14 use for these sorts of covers with composite elements,
15 because one could say that the insured peril is just the
16 interruption or interference from which the loss has to
17 result. But if one is going to treat it as encompassing
18 the cause of the interruption or the interference, it
19 must cover, and have been intended to encompass, all of
20 the ingredients, without being susceptible to insurers
21 choosing which ingredients from the combination to leave
22 behind for the purposes of a counterfactual.

23 As for the disease clauses, if this weren't
24 a virtual hearing you would probably be able to see or
25 hear those insurers with those clauses signifying their

1 vigorous agreement to what I just said, with Mr Kealey
2 perhaps grinning like a Cheshire cat, implying that of
3 course in their cases the insured peril is the disease
4 within the relevant policy area and therefore Mr Edelman
5 has just confirmed for us that the counterfactual is the
6 business not being in their area but being everywhere
7 else.

8 LORD JUSTICE FLAUX: He could turn on his camera and we
9 could see whether he is was laughing like a Cheshire Cat
10 or not.

11 MR EDELMAN: I'm sure he was. He needs no encouragement.

12 Then again one asks, when one turns to those
13 clauses, what are they insuring against? They are
14 insuring against the risk of outbreaks of infectious and
15 contagious diseases, and there are two aspects of the
16 nature of the peril that they are insuring against.

17 Firstly, if you are dealing with something occurring
18 not at the premises, but at some distance from the
19 premises, whether it is one mile or 25 miles, you are
20 necessarily not addressing something that would of
21 itself directly affect the business or its premises.
22 You are not talking about a contamination. Rather, you
23 must necessarily be contemplating something else
24 happening, which does have an effect on the business,
25 most obviously the reaction of the authorities, but it

1 could of course also be the reaction of the public.

2 So we are talking about an insuring provision that
3 is contemplating the indirect effects of the outbreak of
4 the disease through its effects on the authorities or on
5 third parties in terms of their reaction to it.

6 Furthermore, no restriction is placed on the
7 geographical scope of such reaction. It doesn't have to
8 say -- it doesn't say that the reaction has to be in any
9 particular area, it is only the disease that has to be
10 in the relevant policy area.

11 So there is nothing that requires or contemplates
12 the reaction to be confined in its effect, only to the
13 relevant policy area. And it must contemplate, at least
14 potentially, a wider scope. That is a critical point
15 for coverage purposes, because it is whether the disease
16 affects the insured in the way contemplated and required
17 by the policy. Because it is the outbreak of the
18 disease causes something else to happen, this must be
19 what the policy is contemplating, something 25 miles
20 away or even a mile away. I say contemplating something
21 else happening which then causes the interruption or
22 loss to the insured.

23 Now, the second aspect of these clauses is the
24 subject matter of them, which is disease and,
25 invariably, notifiable disease. But that encompasses

1 necessarily, obviously through the word "notifiable",
2 but even if "notifiable" is not used, if you are using
3 a concept, as one does, of a human contagious,
4 infectious disease. But I think they all refer to
5 "notifiable". You are talking about diseases including,
6 potentially, some newly emerging disease against which
7 there is no known vaccine and which is capable of
8 causing an epidemic. Now, this is not the benefit of
9 hindsight, because amongst the diseases on the list of
10 notifiable diseases is SARS, made notifiable following
11 its outbreak in the Far East; and of course we have had
12 experience of new strains of flu which come and go, and
13 sometimes can be serious, and we know from history that
14 in the past there have been very serious outbreaks.

15 So that is the nature of the beast that these
16 clauses are contemplating.

17 It leads on to the question: if that is the true
18 nature of the insured peril, was it really the intention
19 of the parties that causation should have the effect of
20 allowing for a counterfactual where an epidemic of such
21 a disease occurred everywhere in the country, except the
22 relevant policy area? And where the reaction of the
23 authorities to the epidemic is to be treated by this
24 counterfactual as if it was a reaction to the outbreak
25 everywhere other than the relevant policy area?

1 My Lord, I hope Mr Justice Butcher is all right .
 2 I couldn't see him on the screen .
 3 LORD JUSTICE FLAUX: He is just looking at something,
 4 I think .
 5 MR EDELMAN: I'm sorry.
 6 So the question is: can that truly have been
 7 intended to be the counterfactual, or is the purpose of
 8 the relevant policy area merely to ensure that the
 9 policy will only respond as long as the disease itself
 10 was present in the relevant policy area, ie it doesn't
 11 have to be exclusively, but as long as it is?
 12 That then makes absolute commercial sense of the
 13 choice that insurers have of the size of the relevant
 14 policy area .
 15 MR JUSTICE BUTCHER: Why would you want to say that,
 16 Mr Edelman? If you are, as it were, covering something
 17 which might be caused well outside that area, why would
 18 you then want to say that there needs to be some
 19 incidence within the area?
 20 MR EDELMAN: This is exactly what I was going to say,
 21 my Lord caught me in mid-sentence, because we are now
 22 looking at a disease which has spread very quickly and
 23 very dramatically . That is on the spectrum of
 24 possibilities .
 25 But there is a whole range of lesser possibilities ,

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1 and the choice that insurers have as to their commercial
 2 risk is to how serious an outbreak they are prepared to
 3 cover . The more extensive the relevant policy area, the
 4 less severe the outbreak would need to be for the policy
 5 to be triggered .
 6 LORD JUSTICE FLAUX: I don't see how that works in the
 7 question that my Lord posed to you, because if the truth
 8 was that this was intended to cover epidemics or
 9 pandemics or whatever, then the loss which the insured
 10 suffers is the same, irrespective of whether there is an
 11 incidence within 1 mile, 25 miles or whatever. What the
 12 insured would want to be protected against in that
 13 example is the loss he is going to suffer as a result of
 14 government action closing his premises because of an
 15 epidemic disease in the country . So the 1 mile and the
 16 25-mile limits don't seem to me at least to make any
 17 sense at all, if this was epidemic cover .
 18 MR EDELMAN: My Lord is misunderstanding my point and it may
 19 be my fault .
 20 LORD JUSTICE FLAUX: Possibly, Mr Edelman.
 21 MR EDELMAN: It may be my fault for not presenting it
 22 correctly .
 23 When you are giving this cover, you are covering
 24 a range of possibilities, from minor local outbreaks of
 25 something like measles all the way up to some new

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1 unexpected disease, an epidemic. The fact that that is
 2 within the ambit of the insurance doesn't mean that that
 3 is, as it were, the vanilla risk that the insurance is
 4 covering .
 5 I think it may be still up on the screen, let's look
 6 at the RSA policy. One of the perils is earthquake, the
 7 first one. Yes, there are some very minor earthquakes
 8 in the UK, often associated with mining activities, but
 9 the UK is not known for being at risk of earthquakes .
 10 But, of course, the insurers, by that language, do take
 11 the risk of some cataclysmic event, unexpected, which
 12 only with hindsight do the scientists realise will recur
 13 everyone million years, and it is just bad luck. It is
 14 like those who got caught out by the October 1987 and
 15 the January 1997 storms, 300-year return dates. That is
 16 within the scope of the risk, however unexpected it is .
 17 Now, what my Lord was putting to me is this is
 18 epidemic cover. It's not designed as with this
 19 earthquake cover, it is not contemplating as the
 20 ordinary risk, the cataclysmic earthquake, but it is
 21 encompassing epidemics within its scope, and when you
 22 look at the relevant policy area that makes sense for
 23 the nature of diseases that would occur, as in the
 24 nature of the earthquakes that would occur .
 25 And that means that if one has a one mile policy

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1 there is less risk for the insurer of being impacted by
 2 a disease which breaks out than if one has a 25-mile
 3 limit . But if one has a 25-mile limit, one is already
 4 contemplating that there could be something pretty
 5 serious, because for something in Maidenhead to affect
 6 a restaurant in Central London, which is the outer edge
 7 of a 25-mile radius from Central London, it must be
 8 something quite significant . It is not going to be an
 9 outbreak of measles or mumps, not going to be
 10 Legionnaires' disease, but of course having the one mile
 11 limit means that even if the insurer was insuring in
 12 Maidenhead, if there was an outbreak of Legionnaires'
 13 disease there would be less chance of it affecting the
 14 one mile radius than it would if he had 25 miles .
 15 So it is a relevant restriction for the nature of
 16 the risk, in that it does affect the extent of the risk
 17 that insurers are taking. But, and this is the critical
 18 point, it doesn't define it, because what they are
 19 insuring is the nature of the disease and the reaction
 20 to it . All they are doing is saying it must at least
 21 impact in your area, the disease must impact in your
 22 area for you to be covered .
 23 So if something happens in London and because
 24 politics are said to be London-centric, they shut down
 25 the country when there is no incidence of the disease in

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1 Manchester, you have no cover. But if, as in this case,
2 the disease is everywhere, it just so happens because of
3 the severity of the epidemic that the period, that the
4 distance requirement does not have the effect of
5 protecting insurers.

6 So that's the essence of the point. If one has
7 a severe epidemic and an insurer that is taking on the
8 risk of notifiable diseases, which can include a new
9 epidemic disease, why should one then have the
10 counterfactual, which we would submit is a rather
11 ludicrous and far-fetched one, that the serious epidemic
12 that has affected the whole country is to be assumed not
13 to have affected the relevant policy area, when
14 a potential epidemic is within the ambit of the risks
15 against which the insurer has provided cover?

16 I emphasise again, it is within the ambit. I am not
17 saying this is there for epidemics, it is not there just
18 for epidemics, but it does encompass it.

19 What we would submit is to apply insurers'
20 counterfactual would defeat what was the apparent
21 commercial purpose of the clause, namely to protect the
22 insured against being caught up in the consequences of
23 a wide area disease which manifested itself amongst many
24 locations, including the relevant policy area.

25 So what we really are faced with is insurers seeking

1 to insert into the insuring clause the word "only", only
2 within 1 mile, only within 25 miles, through the
3 counterfactual, which is not there, and doesn't make any
4 sense in the context of the nature of the risk.

5 So in our submission it all boils down to an
6 analysis of the insured peril not just focusing on the
7 words used, but its implications. One has to focus on
8 what the implications of the language actually are that
9 the disease is going to cause somebody else to act, and
10 the nature of the disease may be anything from
11 a localised outbreak like Legionnaires' disease or
12 measles to a new epidemic that becomes notifiable. Only
13 by understanding that, in our submission, can one then
14 adopt a correct approach to causation.

15 Now I want to descend into a little bit more detail.
16 That was very much sort of overview stuff, and I want to
17 descend into a little more detail and start with some
18 illustrations and the public authority action clauses.

19 Let's have a look for that purpose, just for
20 illustrative purposes, at Hiscox's skeleton. It is
21 {1/13/111}. I seem to have the wrong page. Can I just
22 check? Sorry, page 47. Sorry. We want to see the
23 clause first. It says:

24 "We will insure you against your financial losses
25 ..."

1 Inability to use the insured premises following ...
2 and what I want to look at is not the one that we are
3 concerned with but with (e), "vermin or pests at the
4 insured premises."

5 Let's imagine a situation in which building works
6 next to a restaurant disturb a colony of rats, which
7 escape into the kitchen of the restaurant and scatter
8 throughout the kitchen and elsewhere in the building,
9 concealing themselves quite rapidly.

10 The owner, being the responsible person that he is,
11 calls pest control at the local authority. The local
12 authority shuts down the restaurant until they can be
13 sure that the rats are eliminated. This takes two
14 weeks. Hiscox asks whether the FCA's case is that it
15 should recover the 40% reduction in takings after the
16 two weeks' interruption. We say the answer is to look
17 at the clause. It is asking the wrong question and
18 it is not what they are getting at with this case.

19 The interruption caused by inability due to
20 restrictions following vermin was for two weeks. The
21 losses from that interruption are recoverable, not
22 losses that do not result from that interruption,
23 whether after or before. So we say -- and this is
24 insurers trying to paint our case differently from what
25 it is -- we are just focusing on that two weeks.

1 Then the real question, because this is where
2 insurers are coming from, is whether, given that this is
3 an action following vermin clause, whether the parties
4 intended that the recoverable losses should be reduced
5 by reference to those losses which would have resulted
6 from the vermin having been there, because that is what
7 insurers' case is, plainly there would always have been
8 losses due to vermin, the expressed underlying cause,
9 even without public authority restrictions, given that
10 the restaurant owner plainly was not indifferent to the
11 presence of rats. The first thing he did was to phone
12 the local authority when he discovered the rats. This
13 is not the sort of restaurant owner who would say "Oh
14 well, never mind I've got rats in my kitchen, maybe
15 I will put those in one of the dishes and the customers
16 won't notice".

17 But any reasonable person would understand it to be
18 intended that for the purposes of assessing the losses
19 during the two weeks of the restriction, the vermin are
20 to be excised from the counterfactual, rather than
21 having to calculate the revenue that would have been
22 earned with vermin in the restaurant during the period
23 of restriction, but without the authority restriction.

24 That would render the cover entirely illusory.
25 But that is what the defendants' case is. They say:

1 you have been shut down due to vermin in your
 2 restaurant. The counterfactual is that you have still
 3 got vermin in your restaurant but you are not shut down.
 4 Now that is not -- and they say, well, Mr Edelman is
 5 treating vermin as the insured peril. It's not about
 6 treating vermin as the insured peril. That is their
 7 point about: well, after the restriction, if you are
 8 right, that means that you still get losses because you
 9 are treating vermin as the insured peril. So after the
 10 restriction is lifted, you still get compensated.
 11 No, I am not saying that at all. It is about
 12 construing what the parties must have intended about the
 13 operation of causation where there is, as here, an
 14 underlying cause capable of having led to its own losses
 15 had the specific trigger not occurred, but where there
 16 is the combination of the underlying cause, the vermin,
 17 and the restriction.
 18 It is rather like, in a sense, the Stansbie case.
 19 In the abstract, the intervention of the burglar may be
 20 a dominant cause, but in the context of a duty that
 21 contemplates the possibility of burglars, where the duty
 22 is to protect against the burglars, the burglary is not
 23 the dominant cause, the dominant cause is the decorator.
 24 You have got to ask what the purpose of the causation
 25 question is, what is the purpose of the policy, why are

1 you asking it, and in what context.
 2 The defendants are very keen on A plus B plus C plus
 3 D, and my maths was never very good but this is not
 4 a mathematical question; it is about construction and
 5 ascertaining the intention of the parties.
 6 Let's take another public authority action example.
 7 Imagine there was a lorry spill of a toxic chemical
 8 qualifying for policies which cover a danger or
 9 emergency, and the police close the road. Insurers'
 10 counterfactual would be: well, all you subtract is the
 11 police action, and you are still left with the lorry
 12 spill. We don't insure against the lorry spill, we only
 13 insure against the police action, so you don't get any
 14 indemnity. or your indemnity is reduced to the extent
 15 that had there been no police action somebody might have
 16 still been able to get to your premises.
 17 In terms of commercial intent and commercial
 18 purpose, it becomes nonsensical and the cover does
 19 genuinely become illusory.
 20 Let's take an example of Ecclesiastical. They have
 21 given lots of examples of what they say would or
 22 wouldn't be covered in relation to churches. Their
 23 clause covers prevention, hindrance of access or use by
 24 government action due to an emergency.
 25 Their insureds include churches, and they have given

1 some examples in relation to churches we have to assume
 2 there has been an interruption or interference as
 3 a result of a prevention or hindrance of access of use,
 4 we say from 16 March and they say the 23rd. So we say
 5 it includes loss of collections. People couldn't come
 6 to church so they didn't give money. But for the
 7 interruption or interference, would the collection have
 8 been received? But for the church being closed, they
 9 would have come to church. But when answering that
 10 question, do you take a counterfactual in which the
 11 church is not closed but there is still the emergency,
 12 which is one of the ingredients of the clause? Perhaps
 13 I'll give the reference for the skeleton, so you can see
 14 how they have expressed it; it is {1/12/63}. We will go
 15 through these examples in a moment.
 16 So the collection, yes. Then they say the
 17 collections you want to ask: well, the church was closed
 18 but there would still have been an emergency. So they
 19 subtract the closure or they say the closure is the
 20 insured peril, but there would still have been the money
 21 which is an earning of the clause.
 22 We say that is indistinguishable from my toxic spill
 23 and from the vermin example. What you are doing is
 24 taking an ingredient of the clause and using that
 25 ingredient as a contemplated ingredient as

1 a counterfactual. They give examples, and the first one
 2 they say:
 3 "Monthly donation has been regularly received for
 4 several years ...[As read]... you have weekly services
 5 held via Zoom ..."
 6 Was it caused by the insured peril. We say that all
 7 depends on what prevented the donation.
 8 The interruption or interference, that is the
 9 closure due to the emergency, was neither a "but for"
 10 nor a proximate cause of stopping the donation, so you
 11 don't get to a counterfactual.
 12 That fails at the first hurdle, and we really don't
 13 understand what point it is that Ecclesiastical is
 14 trying to demonstrate with this case. What they are
 15 trying to do, perhaps, is paint our case as being an
 16 extreme one to knock it down. But they are just tilting
 17 at the wrong target.
 18 Our case is, as with the vermin case, that they are
 19 telling us in that sort of case that we would either get
 20 no indemnity or a reduced indemnity, because you
 21 subtract the vermin, you leave the vermin in for
 22 a counterfactual, and you subtract the local government
 23 action.
 24 Then they say, I think it is on the next page
 25 {1/12/64} -- can we move to the next page -- so they

1 have mischaracterised and perhaps misunderstood our
 2 case, but the next page they say:
 3 "From Early March ... the local group starts to see
 4 a marked downturn in the number of elderly people
 5 attending its events -- not least after the first UK
 6 deaths from COVID-19 are reported. The organisers
 7 decide to suspend their meetings before the government
 8 regulation in late March.
 9 "The agreement between the local group and the
 10 church is informal and rent is paid week by week ... [As
 11 read] ... the local group leader on his daily walk ...
 12 shouts from a distance that he hopes they can start up
 13 again soon and the local group leader shouts back that
 14 even if the church was reopened he can see no hope of
 15 starting again in the foreseeable future, because
 16 several of the group have died and the others are
 17 shielding strictly ."
 18 Now that poses a straight causal question. It is
 19 not a simple counterfactual question, it is simply
 20 a question of "but for" the interruption or
 21 interference, would the rent payments have been
 22 received? And it is going to be a question of fact
 23 where there is casual income like this, and the answer
 24 will depend on the facts. If the 16 March order to stay
 25 at home and minimise travel and shield amounts to

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1 qualifying interference or interruption or interference,
 2 and the cancellation was after 16 March, then the loss
 3 may result from the interruption or interference,
 4 depending on the reasons of the group for cancelling .
 5 If the 16 March order to stay at home and minimise
 6 travel was not interruption or interference, then the
 7 income stopped before any interruption or interference,
 8 it wasn't the result .
 9 But this is the important point: going back to the
 10 collections, our vanilla case, the loss of collections
 11 because people can't come to church because the church
 12 is closed, what is being said is: ah well, because of
 13 the emergency they wouldn't have come to church anyway.
 14 So the closure, the added ingredient of the closure,
 15 didn't cause you any loss, because of that
 16 counterfactual .
 17 That is where we part company from the defendants.
 18 That is where we say it is wrong in principle to start
 19 carving out an ingredient of the clause and using that
 20 as a counterfactual to reconstruct .
 21 That, in essence, where you have got these composite
 22 clauses, that in essence is what our case is. We are
 23 not trying to recover losses like the restaurant
 24 donation that you saw, that has nothing to do with the
 25 closure of the church. Other policyholders may want to

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1 argue that, the FCA is not. We are not precluding
 2 people from arguing it, but that is not the case that we
 3 are advancing.
 4 We are simply advancing the argument that if
 5 people -- if you lose collections because there is
 6 closure of the church due to an emergency, you don't
 7 take out the closure and imagine the emergency, just as
 8 you don't take out the local authority restriction and
 9 imagine the rats are still there, and you don't take out
 10 the police closure and imagine that the toxic lorry
 11 spill is still there. That would just undo the value of
 12 the insurance from anybody's perspective. It is not
 13 reasonable expectation. That is just commercial purpose
 14 inferred from the clause. You are working that out not
 15 by reference to authorities, you are just asking what is
 16 the purpose of this.
 17 MR JUSTICE BUTCHER: I understand, Mr Edelman, but I think
 18 one of the things which insurers say is in the sentence
 19 which you have just uttered, you assume that there has
 20 been a loss of the collections by reason of the church
 21 being closed as a result of advice or action. But
 22 I think one of the things which they say is because of
 23 the emergency, you didn't lose it because of that, the
 24 people wouldn't have been going anyway. In other words,
 25 you haven't got through the initial causative door.

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1 MR EDELMAN: But that is the same point, my Lord, as the
 2 lorry spill. Well, you say, the police closed off the
 3 area but that was 15 minutes after the lorry spill. You
 4 have got to prove what your loss would have been without
 5 the lorry spill. Because without the police cordon you
 6 would have still had the lorry spill. But of course the
 7 lorry spill is why you have got the cordon. That is the
 8 point I was making, that if you extract what they are
 9 saying is, well, you have got to take out the police
 10 cordon and then work out and prove that your loss or to
 11 what extent your loss is due to the added element of the
 12 police cordon, as opposed to the lorry spill which you
 13 have already got.
 14 My vermin case, you have got to prove what your loss
 15 is by virtue of the public authority restriction in
 16 circumstances where you have already got rats in your
 17 kitchen, but the policy is contemplating that there is
 18 a package of things, and it is simply a question of, you
 19 know, it is a question of judgment as to what the
 20 commercial purpose of this is, but do you unpack that
 21 package?
 22 What it is contemplating is that the church is only
 23 closed because there is an emergency. Do you assume: oh
 24 well, we will take the emergency; or do you say: right
 25 that is the package, and if you suffer a loss because an

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1 emergency causes the church to be closed, you ask what
2 would the church's takings have been without that
3 package?
4 Just as you have the package of the vermin and the
5 local authority action, you take that package out. Now,
6 that doesn't mean that you take the vermin out for all
7 purposes. As soon as they cease to be a package, in
8 other words, as soon as the local authority restrictions
9 cease, then you only have the uninsured risk of the
10 vermin alone. But when they are in combination, you
11 don't dissect them for the purposes of a counterfactual.
12 I am sorry to use the word "dissect" in relation to
13 rats, but it is appropriate. That is what insurers are
14 doing, they are dissecting these clauses and taking what
15 is meant to be a package insurance, and dealing with it.
16 If one looks, sometimes the simpler cases are the
17 easiest. Police action due to a danger in the vicinity
18 and you get a lorry spill. Is it really intended that
19 you take-out the police action and leave the danger?
20 I am probably repeating myself, but if you start
21 looking at it that way, although we are looking at these
22 clauses in very unusual circumstances, it has huge
23 ramifications for the commercial value of these policies
24 at all. If you are not going to cover the entire
25 combination, I'm not saying that you then, by covering

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1 the combination you are covering each ingredient
2 separately as though when it exists on its own, but you
3 are covering the combination. If the insurers want to
4 say the insured peril is everything, well that is why
5 I went to the Marine Insurance Act, what is the insured
6 peril; it is the cause of the loss.
7 Here you have two combining causes. You have the
8 emergency causing the closure, the government action,
9 the closure of the church. Those are the two causes
10 which combine to create the loss.
11 MR JUSTICE BUTCHER: In your lorry spill case, and this is
12 what you need to help me on, all the loss may be caused
13 by the lorry spill, as it were, and the government
14 action doesn't actually change things at all really.
15 MR EDELMAN: Well it does, in my submission, because what
16 you then have got, if the church is closed, it is
17 inaccessible. That is, you know, you can't say that,
18 well, you could have had collections without the
19 emergency. If you look at the two counterfactuals, the
20 church is closed, that prevents the church collecting
21 any money in the usual way at services. There are no
22 services; it cannot collect.
23 What you are then saying is: why is the church in
24 that situation? It is in that situation because it has
25 been closed because there has been an emergency. That

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1 is what the policy is compensating you for. The simple
2 question is: is the purpose of that cover or any cover
3 to say, well, what would the positions have been if you
4 take out the closure? And in our submission it really
5 does drive a coach and horses through the cover. In my
6 restaurant example, the man does what he should do, he
7 phones the local authority straightaway, and the
8 insurers say: well, you had rats anyway. So although
9 I know we say we will indemnify you if you are shut down
10 because of rats, you had rats anyway. And the man would
11 look at the policy and say: but your policy contemplates
12 that I would have had rats anyway. They are not going
13 to be instantaneous. The entire pre-supposition of the
14 clause is that there are rats on my premises, and you
15 promised me that if I am shut down because of the rats
16 you will compensate me.
17 LORD JUSTICE FLAUX: Will compensate you for the loss you
18 have suffered as a result of the premises being shut
19 down because of the rats.
20 MR EDELMAN: Yes.
21 LORD JUSTICE FLAUX: But if there are just rats and word got
22 around the town that there are rats running all round
23 the street of that restaurant, he wouldn't have any
24 cover, would he?
25 MR EDELMAN: That would come in because the turnover would

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1 have been --
2 LORD JUSTICE FLAUX: No, in my example he wouldn't have any
3 cover because it wasn't a closure, not because it is
4 closed but because word gets around the town, "Don't
5 bother going to Snooks Restaurant because he has rats
6 running around the place".
7 MR EDELMAN: Yes.
8 LORD JUSTICE FLAUX: So it is the closure which is the
9 trigger.
10 MR EDELMAN: The closure is one of the two required
11 ingredients.
12 LORD JUSTICE FLAUX: Yes, okay.
13 MR EDELMAN: But the example I gave was a situation where
14 the rats have entered the premises and, you know, within
15 an hour or two the phonecall has been made. As soon as
16 it is discovered the phonecall is made. And yet the
17 insurer is supposed to be able to say: oh, we
18 contemplated you having rats in your premises and being
19 closed down because of it, we are going to subtract from
20 the counterfactual the fact that you have got rats in
21 your premises, even though the insured combination has
22 occurred.
23 That may be the answer that my Lords come to, but it
24 doesn't strike one as being the sort of result that one
25 would expect when looking at this sort of policy. Of

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1 course, you know, if the restaurant had a reputation for
2 having rats in it, it may be that its turnover in the
3 historical past would have been affected by its
4 reputation for having rats and it will lose its
5 indemnity that way or have a reduced indemnity that way
6 because of its prior turnover.

7 LORD JUSTICE FLAUX: It might have a nominal value.

8 MR EDELMAN: It might do. But in my example, what insurers
9 are contemplating is even though that is not the
10 situation, there has been a sudden escape, that suddenly
11 they are able to take credit for by, through
12 a counterfactual, the fact that you have got rats in the
13 premises. That is what it is all about, isn't it? That
14 is what the cover is all about.

15 Just with the church the cover is all about there
16 being an emergency, which has caused the church to
17 close. And the insurers would have said: well, we will
18 keep the emergency and we will say people wouldn't have
19 gone to church anyway because of the emergency.
20 Insurers would then say: well, people wouldn't have gone
21 to your restaurant anyway, because there were rats there
22 and you, being a genuine restaurateur, you would
23 probably have closed it anyway. But that is not being
24 forced to close down.

25 I have taken that aspect as far as I can. Unless

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1 you have any more questions on that topic, I was going
2 move on to the disease clauses.

3 The first issue is whether the interruption or
4 interference can be said to have been caused by or
5 follow the disease within a specified area. Can I just
6 show you QBE's skeleton, that is {1/17/27}. My
7 references are not very good, it should be {1/17/28},
8 I'm sorry, paragraph 62. Yes, that is better.

9 "QBE fully accepts that local disease may cause BI
10 loss to its policyholders. The same applies whether or
11 not the disease extends beyond the relevant policy
12 area."

13 So they seem to be recognising that the disease,
14 that what they are insuring, quite rightly recognising,
15 that the nature of the diseases they are insuring are
16 those which are capable of spreading over a wide area.

17 But the fact is they say that the worse the disease,
18 the less your indemnity. What they go on to say is that
19 is precisely what the relevant policy area part of the
20 disease clause is sold to protect against: the damage
21 caused by local occurrence of the disease, if it is so
22 caused. It doesn't matter that the disease is also
23 present elsewhere. But it does matter if it is the fact
24 that the disease being elsewhere rather than in the
25 relevant policy area, that is the cause of the BI loss.

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1 The critical words are "rather than", which is,
2 perhaps one might say, a forensic sleight of hand,
3 because the correct words are not "rather than", it is
4 "as well as", which is actually what their case is. But
5 of course it is obviously unattractive to say that. It
6 is only "rather than" when you start with this
7 artificial counterfactual. The truth is it is elsewhere
8 as well as in the relevant policy area, and that is the
9 cause of the BI loss.

10 Let's look at the example. It is a very lengthy
11 example and I hope the page number is right. Page 5 of
12 this tab, paragraph 4.

13 My Lords may in all the reading have remembered this
14 rather convoluted example of numbers of different shops.
15 There are four shops. You will note that they have
16 chosen the one-mile clause.

17 Of course the FCA chose QBE 1 and 2, which had
18 25-mile clauses. QBE insisted on having a 1-mile
19 clause, no doubt so they could put in this example which
20 was entirely based on a 1-mile case. But we will cope
21 with it; live with that. We will live with that
22 forensic advantage being taken, or attempted to be
23 taken.

24 So Shop A. So we have got "not within 1 mile of any
25 outbreak". Interesting that QBE refers to an "outbreak"

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1 rather than a single case. Quite right. But of course
2 the cover is not triggered. That is the commercial
3 advantage of having a policy with only a 1-mile radius.
4 You have got more chance of any disease, whatever it is
5 along the spectrum, not being in your relevant policy
6 area.

7 That may give commercial purpose to the different
8 radius widths. But as an illustration of facts all it
9 proves is why some insureds have cover and some don't
10 and why insurers' risk under a 1-mile clause is less
11 than their risk under a 25-mile clause if there is
12 a disease outbreak. There is less chance of a disease
13 affecting someone in a 3.14 square mile area than there
14 is in an area of 1,963 square miles. That is a lesser
15 risk that insurers take.

16 But insurers also must recognise if there is some
17 new disease, because you will see we have the clause at
18 the top of the page, at 4, "Occurrence of a notifiable
19 disease".

20 Of course insurers would recognise, as they must
21 have done from SARS, that if a new disease comes along
22 there will be a period before it becomes notifiable.

23 Once it becomes notifiable it falls within the
24 clause but when it is not notifiable it doesn't.

25 When it is not notifiable the disease is not

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1 covered. When it is notifiable the disease is covered.

2 Similarly, and Ms Mulcahy will deal with the law, in
3 The Silver Cloud the business would have suffered a loss
4 as a result of terrorist attacks, but the relevant
5 section of the cover responded where there had been
6 a State warning. If there was a warning applicable to
7 the business it was covered; if it wasn't it wasn't
8 covered. It was simply reflecting the terms of cover.

9 I think we have moved on. I think I wanted to be on
10 page 21 {1/17/21}. I am sorry I am on the wrong page at
11 the moment. It is 27, sorry. I am all over the place
12 now. Can my Lords give me a moment?

13 LORD JUSTICE FLAUX: We started off on page 28. You showed
14 us paragraph 62 on page 28.

15 MR EDELMAN: Yes, I am sorry, my Lord, yes.

16 LORD JUSTICE FLAUX: Then you showed us something on page 5.

17 MR EDELMAN: I think we were going back to page 25. Let's
18 go back to page 5, the examples. Yes, {1/17/5}.

19 If we can then move forward to -- my Lords have seen
20 the other examples. There is Shop B, 100 yards away
21 from Shop A, just under one mile from a care home; Shop
22 C 100 miles away from Shop B, just under a mile from the
23 hospital, and Shops A and B just over a mile away from
24 the hospital, and there is a patient admitted and Shop D
25 visited by a Spanish national. Those were the facts.

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1 We go to the next page. {1/17/6}. We then go to
2 5.3. That is the period prior to 5 March. Not
3 a notifiable disease. Therefore no cover. Correct.

4 Then they say whilst it was causing interruption, if
5 it was causing interruption, not capable of being an
6 insured peril. That is absolutely right. It then
7 becomes notifiable and it qualifies under the policy.
8 It doesn't create an insured peril, it just becomes
9 a qualifying disease for the purposes of the insured
10 peril.

11 Now the next page, please. {1/17/7}. Then we have
12 four propositions. The first is the extensions don't
13 provide insurance against loss caused by a pandemic or
14 a national/international government response or public
15 feared pandemic. We submit why not. The clause is
16 triggered. The cover responds. It is triggered by the
17 disease acquiring the status of being a notifiable
18 disease. It is present within 1 mile of the premises.
19 And through the impact on the government action it has
20 caused the interruption.

21 What they are getting at is that they say we are
22 only insuring diseases within the 1 mile area. But
23 that, again we come back to the question of
24 construction, presupposes what this policy is
25 contemplating. If it is contemplating a disease which

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1 would include within its ambit a new pandemic then why
2 shouldn't it be treated as providing insurance on that
3 basis.

4 The second point, they do provide insurance against
5 the occurrence of a notifiable disease. They have
6 rephrased the wording but otherwise, yes.

7 The occurrence, what is required to be the cause of
8 the BI, is the interruption that is the cause of the
9 loss, and it is the interruption following the disease.

10 Let's move on to Shop B. We have got here the
11 example of 23 March. If we go perhaps to the next page
12 {1/17/8}, that example is based on 23 March. There were
13 11,000 confirmed cases. Care home, a case in a care
14 home not diagnosed, someone dies, but what they overlook
15 is that someone must have brought the virus into the
16 care home. This is the Shop B example.

17 If you wanted to see that, that was back on page 5,
18 to refresh your memory. If we go back to page {1/17/5},
19 Shop B is just over 1 mile from a care home.
20 Subsequently a resident died. They don't actually look
21 at the reality of how the person in the care home
22 actually got the disease. It could have been
23 a relative, a care worker going in, but anyway they
24 agree it is within the one mile. But they want to
25 support an argument that because this person's case

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1 wasn't known about until after 23 March this is somehow
2 relevant to the answer.

3 But that is not a solution to their problem, because
4 it is common ground between the parties that the
5 Government did not know about all the COVID-19 cases
6 that existed perhaps especially in care homes.

7 The Government action which caused the interruption
8 was a reaction to cases both known and inferred,
9 anticipated and feared; what I would call the known
10 unknown. You know there is a lot more out there, you
11 just don't know precisely where and how much, but you
12 know there is a lot of it out there. It was a reaction
13 to the known and the known unknown.

14 So the fact that someone did have it in a care home
15 on 23 March, and inferentially must have got it from
16 somebody on 23 March, is sufficient. It was part of the
17 picture that caused the Government action, because of
18 course you can subtract all of these cases, and this is
19 the approach by the insurers. You subtract all of the
20 cases and you end up with nothing. You end up with no
21 COVID in the country at all, because every insurer has
22 subtracted it on the counterfactual.

23 LORD JUSTICE FLAUX: Is that a convenient moment to have
24 a break, Mr Edelman?

25 MR EDELMAN: Yes, my Lord.

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1 LORD JUSTICE FLAUX: My clock says 17 minutes past, so if we
 2 say 25 past.
 3 (3.17 pm)
 4 (Short break)
 5 (3.31 pm)
 6 LORD JUSTICE FLAUX: Okay, Mr Edelman.
 7 MR EDELMAN: Right, I was going to show you {1/12/111}, if
 8 this is the right page.
 9 LORD JUSTICE FLAUX: There we are.
 10 MR EDELMAN: Good. A preface to this, and of course we are
 11 dealing with shop B where we have the case before 23
 12 March, not known about until after, and a causation
 13 question raised in relation to that, just as a reminder.
 14 LORD JUSTICE FLAUX: Yes.
 15 MR EDELMAN: It is common ground that the government didn't
 16 know about all cases of COVID that existed, especially
 17 in care homes, and the government action was a response
 18 to COVID cases known, inferred, anticipated and feared.
 19 This is how it is put in the skeleton. They posed this
 20 hypothesis:
 21 "Consideration was given at a relevant time and at a
 22 relevant level of government, to a master spreadsheet
 23 setting out, line by line, the number of reported cases
 24 of COVID in different areas of the country ...
 25 "The government decision to take action was based on

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1 the totality of what the spreadsheet showed, an
 2 apprehension about the national spread of the disease,
 3 and a concern to minimise spread for the sake of the
 4 public and the NHS.
 5 "The question now being asked is: if a single line
 6 entry ... had not been there (being the entry for the
 7 relevant policy area as proved by the insured), would
 8 its absence have made any difference to the action taken
 9 by the government?"
 10 Firstly, in (b) there is the recognition that it was
 11 the apprehension about the known unknown that was part
 12 of the government action, but there is then the question
 13 as to -- that that example of itself shows that each
 14 line in the spreadsheet is contributing to the overall
 15 picture. It is a national picture. We presented it as
 16 a jigsaw, each relevant policy area is a piece of the
 17 jigsaw. You can talk about it as lines on
 18 a spreadsheet, you can talk about it as pins in a map,
 19 although pins are a bit too small for most of the policy
 20 areas, which are 2,000 square miles almost. But I mean,
 21 this is in essence the point, the insurers want to say,
 22 and each of them say this for their own individual area:
 23 well, subtract my area and you have still got all the
 24 rest. And they can have policyholders in two areas, and
 25 they can say to the one policyholder, "Well, but for the

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1 policyholder in the other area, but for the disease in
 2 your area you would still have had the restrictions
 3 because of the outbreak in the other area", and the
 4 policyholder in the other area, they can say the same.
 5 So nobody pays anything at all.
 6 The way one can look at, there's two ways: one can
 7 say this all represents just one indivisible outbreak of
 8 a disease, and every known and unknown case -- when
 9 I say "unknown", I meant it is the known unknown; you
 10 know it is out there but you just don't know where it is
 11 precisely when you are the government, you just know
 12 it is everywhere, and you are looking at a tip of the
 13 iceberg -- that is all contributing to a picture we
 14 have, hence we used the jigsaw example, you put all the
 15 pieces in the jigsaw together and you have got the
 16 picture. And the picture is of one indivisible
 17 epidemic. An alternative way of looking at it is you
 18 can see each relevant policy area is a concurrent cause;
 19 it's making its own contribution to the national
 20 picture.
 21 Now, the critical question is: when you are applying
 22 these policies, do you go round the country and for
 23 every relevant policy area you take out that jigsaw
 24 piece and say, "I can just about still see the picture
 25 without that jigsaw piece, so you lose"? So nobody

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1 wins, nobody gets paid out for the worst example of
 2 a notifiable disease.
 3 So in other words, what these policies are insuring,
 4 according to the insurers, is a notifiable disease as
 5 long as it's not too bad a notifiable disease. If it is
 6 a really bad notifiable disease, which really impacts on
 7 your business, then we won't insure you. Because if it
 8 is a really, really bad disease, we have always got the
 9 "but for" causation test to fall back on.
 10 They try to legitimise that on the basis, well, we
 11 are only providing for local outbreaks, providing
 12 insurance for local outbreaks. If that is what they
 13 wanted to restrict it to, then why not restrict it to
 14 diseases for which there are known vaccines or known
 15 treatments? We had a little debate about that at the
 16 second CMC, I know, my Lords. But they haven't. It
 17 covers notifiable diseases, including anything which
 18 becomes a notifiable disease because it emerges unknown,
 19 untreatable, no vaccine.
 20 Their policies, they say, only are triggered when
 21 you can prove that a local case actually caused, itself,
 22 or a local combination of cases in your area actually
 23 caused, directly your business to be closed down.
 24 They are dealing with -- someone said this, I think
 25 QBE said this -- it is all about the locality;

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1 a restaurant in Central London because closed down
 2 because of an outbreak in Maidenhead. Is that really
 3 what this is about? Or by accepting that a restaurant
 4 in Central London may be closed down because of an
 5 outbreak in Maidenhead, they are recognising that
 6 notifiable diseases can come in all shapes and sizes,
 7 some can be local, some can be very nasty. And they
 8 price it on the basis that the very nasty hopefully
 9 never will happen. As I said, the January 1987 storms
 10 taking out all of south-east of England.
 11 LORD JUSTICE FLAUX: It was October 1987 and January 1990.
 12 MR EDELMAN: It was the October 1987 which they said
 13 a 300-year return date, took out the south of England,
 14 and then in January 1990 took out --
 15 LORD JUSTICE FLAUX: 1990 took out most of London.
 16 MR EDELMAN: 1990 took out most of London and
 17 Northern Europe as well.
 18 LORD JUSTICE FLAUX: Yes.
 19 MR EDELMAN: That is just insurance. Bad things happen and,
 20 you know, you get two 300-year return date storms within
 21 two and a half years, less than two and a half years of
 22 each other, the second even more devastating than the
 23 first.
 24 LORD JUSTICE FLAUX: The whole LMX spirals, on one view at
 25 least was triggered by a whole series of natural

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1 disasters of one kind or another, all of which were said
 2 to be once in 100 years.
 3 MR EDELMAN: Yes, and it revealed to the insurance industry
 4 the mistake they had made with the spiral market.
 5 LORD JUSTICE FLAUX: Yes.
 6 MR EDELMAN: And maybe, in retrospect, the insurers now
 7 realise or believe they have made a mistake with these
 8 policies. But they are not to be protected from the
 9 fact that a cataclysmic event has happened. That is
 10 just, you know, bad luck being an insurer.
 11 Shop B is a line in the spreadsheet. The disease,
 12 the disease for shop B, that person in the care home is
 13 a line in the spreadsheet. And of course, you know, the
 14 care home, as I have said, the person in the care home
 15 must have got it from somebody, if they are bed-bound in
 16 a care home or confined to barracks in a care home,
 17 somebody has got to have communicated it to the person
 18 in the care home. So it is a pretty good bet that that
 19 was either a relative or someone working in the care
 20 home. Someone brought it in. So one has to be
 21 realistic about this as well.
 22 Would anyone looking at these clauses really think
 23 to themselves: well, if it is both within -- QBE think
 24 "within" is a very strong word in their favour -- but it
 25 is both within and without, you don't have cover?

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1 Because that means that an insurer can always point to
 2 the disease without having a causative effect.
 3 MR JUSTICE BUTCHER: Of course I understand the force of
 4 your point, Mr Edelman, about the worse the disease, the
 5 less the cover. I understand that argument. What I am
 6 still troubled by is what is the purpose of the
 7 requirement that anyone should have got it within the 1
 8 mile or the 25 miles? That would just be happenstance
 9 in a sense. Because if there is cover for something,
 10 for a notifiable disease which has an effect on the
 11 premises, what is the purpose of stipulating that
 12 someone should have got it within 1 mile or 25 miles?
 13 MR EDELMAN: My Lord, the distinction may be between these
 14 policies and someone like I think it is Arch, which just
 15 has "government action following an emergency". They
 16 are exposed to a government action wherever the
 17 emergency happens to be, as long as the action that is
 18 taken affects the insured's business.
 19 They have conceded, Arch have conceded that the
 20 emergency is the whole COVID situation in the nation.
 21 LORD JUSTICE FLAUX: That identifies the nature of the
 22 difference between the Arch policy and the other
 23 policies that we are concerned with, but it doesn't
 24 actually answer the question that my Lord posed, which
 25 is a question that troubles me as well. If you are

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1 right, then the 1 mile and 25-mile point is completely
 2 otiose, because the reality is that -- I say it is not
 3 otiose, because it is in there, so it provides
 4 a restriction on the scope of cover, but it is
 5 completely meaningless, because the reality is that if
 6 it is everywhere, then the 1 mile/25 miles restriction
 7 is going to be satisfied in every case.
 8 MR EDELMAN: It is on this epidemic, my Lord. That is the
 9 important point. One must look at what this -- what is
 10 the sort of as it were the bread and butter disease
 11 outbreak.
 12 LORD JUSTICE FLAUX: The bread and butter disease outbreak
 13 presumably is an outbreak of measles or mumps in the
 14 town which leads to the closure of the schools or the
 15 restaurants or whatever it happens to be.
 16 MR EDELMAN: Exactly, yes. And the area where the disease
 17 occurs in that sense is controlling the degree of the
 18 insurers' risk. Because you have got to be within
 19 a certain -- even if you are affected by the action, the
 20 government action or the local authority action, you
 21 have to be within a certain distance of the disease for
 22 you to have cover.
 23 So if there is precautionary action taken, let's say
 24 you have got a 1 mile clause and, you know, you are in
 25 the City, and something happens in Piccadilly which

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1 causes restrictions in all of Central London, then there
2 is no cover if the outbreak, whatever it is, that
3 occurred in Central London was more than a mile away
4 from your premises. It may be affecting you, but your
5 business interruption cover doesn't cover it, because
6 the outbreak of the disease was more than a mile away.
7 It is a way of controlling the risk.

8 LORD JUSTICE FLAUX: Not on your case, no.

9 MR EDELMAN: My Lord, it is.

10 LORD JUSTICE FLAUX: If it is a sufficiently serious
11 outbreak, then it is going to impact everywhere.

12 MR EDELMAN: My Lord, no. It depends what disease you are
13 talking about.

14 LORD JUSTICE FLAUX: I understand that point, Mr Edelman.

15 MR EDELMAN: Let's talk about an emergency. Let's take
16 disease out of the equation for the moment and talk
17 about something like happened in Salisbury. You might
18 have a clause which talks about local authority or
19 government action following an emergency within 1 mile
20 of your premises. Now, if you are in the middle of
21 Salisbury when the Novichok was discovered, I mean the
22 danger of that is they didn't know where it was, and
23 that was an emergency. If you are in the centre of
24 Salisbury you are covered. If you are on the outskirts
25 of Salisbury, I don't know how big Salisbury is, but on

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1 the outskirts, more than a mile away from the centre --
2 LORD JUSTICE FLAUX: Far enough to be more than a mile away
3 from the centre, sure.

4 MR EDELMAN: -- then you don't have cover, even though the
5 whole area of Salisbury is closed down, if the clause is
6 an emergency within 1 mile.

7 One has to remember also there are sub-limits to
8 many of these clauses. So one can see this as a way of
9 insurers controlling their risk with 1 mile, but with
10 25 miles -- my Lord says: what is the purpose of that?
11 In a sense, with 25 miles you are already covering
12 a regional risk. 25-mile radius is about 4% of England.

13 LORD JUSTICE FLAUX: It depends on where you are. Go back
14 to your example of Cornwall, and also I think one of the
15 insurers says with some force that quite a lot of the
16 25-mile radius, for example down pretty well the whole
17 of the south coast, will actually be in the middle of
18 the English Channel.

19 MR EDELMAN: Yes, absolutely.

20 LORD JUSTICE FLAUX: So it does depend on where you are.

21 But I have got your submission, I think we have got your
22 submission, it is a way of insurers controlling their
23 risk.

24 MR EDELMAN: It is, and they can choose 1 mile vicinity,
25 25 miles, that is the way that they protect themselves

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1 against local outbreaks, because they protect themselves
2 against local outbreaks with the 1 mile. 25 miles can
3 be seen to be very generous. I quite accept that when
4 it comes to a -- it is not once in a lifetime perhaps,
5 because it is probably more than once in a lifetime, but
6 it may be. The last epidemic, really, really bad one,
7 was perhaps Spanish flu.

8 LORD JUSTICE FLAUX: I think certainly in your lifetime and
9 my lifetime, but possibly not some of the other people
10 representing various parties, the 1957/58 Hong Kong --
11 I think was it the Hong Kong flu, one of them, that was
12 actually very bad.

13 MR EDELMAN: Yes, my Lord.

14 LORD JUSTICE FLAUX: I forget how many people. And the one
15 in the late 1960s, something like 90,000 people are
16 thought to have died in this country.

17 MR EDELMAN: Yes, and there was, of course, also a polio
18 outbreak, I think.

19 LORD JUSTICE FLAUX: That was also very bad.

20 MR EDELMAN: Certainly one which has had as dramatic an
21 effect as this has, it is unprecedented, of course, but
22 that doesn't mean that it is not within the insurance
23 risk. And the fact that it is so serious and has
24 provoked such serious consequences that in fact
25 protections that insurers built into their policies

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1 don't work to make any difference, is just a product of
2 the risk that the disease that has eventuated.

3 It is really a question, it is almost, you know,
4 sitting back and thinking about the purpose of this: are
5 these restrictions really intended to eliminate coverage
6 for the most serious type of notifiable disease, in
7 circumstances where the clause is contemplating such
8 a disease? It is in the definition of "Notifiable".
9 One of the possible ingredients of what makes
10 a notifiable disease notifiable is that it has the
11 capacity for epidemic. That is not an exclusive one, it
12 doesn't have to have an epidemic capacity, but it is one
13 of the factors taken into account: is it an epidemic
14 disease, contagious, infectious? So they are
15 contemplating a new epidemic disease.

16 The question is: is this a way of excluding
17 liability for the worst sort of disease or is it just
18 actually a control mechanism for the day in and day out
19 outbreaks, with the 25-milers actually offering generous
20 cover for that?

21 I am reminded that if you want statistics on prior
22 deaths, they are in {C/12/2}. It is 33,000 deaths in
23 1957/58 and 80,000 in 2968/69. It is just up on the
24 screen there, "Excess mortality".

25 But of course the predictions, whether they were

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1 right or not, the predictions were that those figures
 2 would have been dwarfed had the government not taken the
 3 action it did.
 4 My Lord has gone on mute, I think .
 5 LORD JUSTICE FLAUX: That is a different issue, which
 6 mercifully we are not concerned with.
 7 MR EDELMAN: No, no, but I think one can't compare the
 8 mortalities --
 9 LORD JUSTICE FLAUX: Absolutely not. But one was just
 10 looking to see the scope of previous outbreaks. You are
 11 absolutely right, the worst -- the Spanish flu was worse
 12 than anything else .
 13 MR EDELMAN: Yes. The only reason I mention that is because
 14 it is said, or one of the arguments for the lockdown
 15 across all of Europe, except of course insurers '
 16 favourite place, which is Sweden, which may have been
 17 due to local constitutional reasons but we won't go into
 18 that, was because the fear that if we didn't have
 19 lockdown the volume of cases would be so great that
 20 hospitals wouldn't be able to treat people with it, and
 21 the mortality rate would be far higher than -- firstly
 22 the contagion rate would be far higher, and also the
 23 mortality percentage would be higher because there would
 24 be inadequate hospital beds to help people through if
 25 they were severely affected. So it was the double blow

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1 of that, over much higher infection and much higher
 2 mortality .
 3 So, yes of course we are looking at a very
 4 exceptional situation, but the question is: does the
 5 insurance apply to it?
 6 LORD JUSTICE FLAUX: Yes.
 7 MR EDELMAN: If it does, if it is, if one looks at it and
 8 says, well, it can't be excluding that prospect; and if
 9 it is not excluding it, then does causation come to the
 10 rescue? Because that is actually what these insurers
 11 are saying. They are saying; well, we could have said
 12 "only" but we didn't. But we will try and -- I think
 13 one argument was "within" means "only", which it
 14 doesn't. But causation, like the white knight on
 15 a horse comes charging to the rescue to deliver insurers
 16 from the absence of any restriction in their policies .
 17 This is not talking about -- I am not talking about
 18 a pandemic exclusion; I am talking about insuring risks
 19 of notifiable diseases .
 20 My Lords, I should, after some digression, return to
 21 Mr Howard's wonderful shops.
 22 LORD JUSTICE FLAUX: We diverted you somewhat, Mr Edelman.
 23 MR EDELMAN: No, no, I took you off because shop B led me on
 24 to a major topic. So it was self-made digression .
 25 We are on to shop C now, which is {1/17/8}. We have

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1 got this shop being a mile away from shop A. Remember,
 2 shop A had nobody within a mile. Shop C does have
 3 somebody within a mile. What he says in 7.2 is he says:
 4 "The critical ..."
 5 I see what the difference is now. I was working on
 6 a version before references were added, and I worked on
 7 those skeletons when they came, and the adding of
 8 references has changed the formatting. So I apologise,
 9 I tried to work out page numbers, but I will try and
 10 work through it .
 11 Does it make any difference that shop C was within a
 12 mile of a person who was diagnosed?
 13 "The critical difficulty for the insured would be to
 14 establish that the occurrence had any causative effect
 15 on the business .
 16 "Any downturn due to general concern about the risk
 17 of contracting ... government's advice, all of that
 18 happened whether or not there was a diagnosed case in
 19 the hospital. Put simply, whilst the insured peril had
 20 occurred (disease) within the 1 mile, it had not caused
 21 BI loss ."
 22 To which the answer is the same as for shop B. Of
 23 course it caused the loss. It contributed, as every
 24 single reported case and every single actual case, which
 25 was part of the known unknown, contributed to the

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1 picture that that government had of a national outbreak.
 2 What are the ramifications of the insurers '
 3 approach? Let's take the Isle of Wight, which has
 4 a length of about 20 miles. Let's imagine that there
 5 was a disease, not this disease, a disease outbreak on
 6 the Isle of Wight which resulted in the Isle of Wight
 7 going into lockdown. Being an island, it could be cut
 8 off from the rest of the UK.
 9 According to Mr Howard's logic, QBE's logic, not one
 10 of the businesses on the island would get a penny from
 11 their insurance under this form of QBE policy. Not one.
 12 Because in respect of each policyholder QBE could say
 13 "Ah, but for -- well, firstly the individual cases that
 14 occurred in your area did not cause the lockdown. That
 15 would have happened anyway because of all the other
 16 cases outside your one mile radius". So they would say
 17 that to policyholder A. Then policyholder B they would
 18 say exactly the same thing, including, in their
 19 counterfactual, the cases in the area of policyholder A.
 20 So neither A nor B nor anyone else gets paid a penny.
 21 That is the effect of the counterfactual. The
 22 minute the disease spreads materially outside the
 23 relevant policy area, the policy ceases to apply,
 24 because you then cease to be able to prove that but for
 25 the outbreak in your area you wouldn't have suffered

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1 the loss .
 2 Now, that may be the result my Lords say follows
 3 from the proper laws of causation , but before you get to
 4 that you would be asking yourself what the commercial
 5 purpose and intention of these covers actually was, and
 6 was it intended to operate that way. That drives the
 7 causation question .

8 All of us will spend many hours arguing it , but it
 9 really does boil down to that very simple question .
 10 What was the commercial purpose of this? What risk was
 11 it actually insuring? Because the causation rule can't
 12 be employed to undermine the risk that was being
 13 insured .

14 I can give other examples, but take Wales. Let's
 15 say, you know, it is only 170 miles long; I know it is
 16 quite an irregular shape, so there might be quite a few
 17 25 miles, but cases in Cardiff but a number of cases in
 18 Swansea, 50 miles away, further afield in Pembrokeshire
 19 and the north, nobody gets paid out. Even with
 20 a 25-mile radius policy nobody gets paid out, because
 21 the insurers can always say -- let's say there are four
 22 25-mile radius areas for the sake of argument, that is
 23 about the size of Wales but I know it's irregular , and
 24 some would be out to sea, so I take that into account,
 25 it is just hypothetical , but you can say, well , each

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1 area, but for your area there would still have been the
 2 three others, and they still would have locked down
 3 Wales, so no payment.

4 Of course there are, as I have already indicated ,
 5 policies which have triggers which are triggered by an
 6 emergency likely to endanger life .

7 One sees that in Arch, Ecclesiastical , RSA2. Danger
 8 in Amlin and Zurich; threat or risk of damage or injury
 9 in Amlin 3; health reasons or concerns, RSA4; incident
 10 in some of the Hiscox policies and Amlin2.

11 For those QBE's examples are good examples of why
 12 there is cover: the national public authority responding
 13 to the spread of disease .

14 Perhaps before I leave the example we should perhaps
 15 go on to Shop D which is page 9 of I/17. {I/17/9}

16 COVID is brought into the shop three times by
 17 a Spanish visitor . What they say is the visit was
 18 unknown, didn't amount to an occurrence of a notifiable
 19 disease .

20 We say, yes it did, the man was actually in the shop
 21 and he had the disease . It was unknown. Yes, but that
 22 is what the government was reacting to. There is
 23 theoretically more --

24 LORD JUSTICE FLAUX: I think his point is that it was before
 25 it became a notifiable disease in England. So it was on

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1 5 March, wasn't it? So the visit on --

2 MR EDELMAN: It was the day after, my Lord, 6 March.
 3 Notifiable on the 5th.

4 LORD JUSTICE FLAUX: But 6 March. I was looking at the
 5 first one.

6 MR EDELMAN: Yes, notifiable, yes.

7 LORD JUSTICE FLAUX: Yes.

8 MR EDELMAN: I think in his example he says "... visited on
 9 the 1st, the 6th and the 10th". I agree on the 1st it
 10 wasn't notifiable .

11 LORD JUSTICE FLAUX: No.

12 MR EDELMAN: But he had it. He was still in the area
 13 because he visited the shop on the 6th and the 10th. So
 14 there was an occurrence of the disease within the area,
 15 and it is just part of the tableau that was presenting
 16 itself country-wide.

17 I am trying to see if I can shoot forward. But if
 18 one looks at the 25-mile clauses and the spreadsheet
 19 example, one has got even fewer lines on the spreadsheet
 20 for 25 miles. I will not give a number because of
 21 course the coast is very irregular . But that
 22 demonstrates that even more clearly , because it can't
 23 have been intended only for purely local outbreaks, not
 24 in the locality . That is, as I said, Central London and
 25 Maidenhead.

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1 So that is necessarily contemplating something much
 2 broader. And then to expect that clause not to cover,
 3 spill over into other areas, for cover to go when you
 4 are already contemplating 2,000 square miles is we say
 5 wholly unrealistic .

6 So we say the answer to this case is to be found in
 7 the way in which one approaches causation . For
 8 a composite clause one excludes from the counterfactual
 9 the contemplated elements. For a disease clause you
 10 proceed on the premise that the parties contemplated
 11 a disease outbreak which might be part of a larger
 12 outbreak, hence the fact that it was related to
 13 notifiable diseases, but it was not the intention of the
 14 parties for causation to operate by treating the
 15 outbreak as a whole as part of a counterfactual . And
 16 the rationalisation in causation terms is that the
 17 outbreak would be a single and divisible cause or
 18 a current interdependent series of causes, all
 19 contributing to the same picture.

20 My Lords, can I just say a few words about the word
 21 "following", because that is one of the causal
 22 connectors. It is a different topic. QBE and others
 23 require language which says on the disease clauses that
 24 the interruption must follow or be a consequence of the
 25 disease . Hiscox and Zurich require that the public

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1 authority action follow the disease, or a danger, or
 2 a disturbance in Zurich.
 3 Hiscox says that "following" requires a causal nexus
 4 but looser than the other connectors in their wording
 5 such as "resulting from", "due to", "whereby".
 6 MR JUSTICE BUTCHER: This is where they have had a change of
 7 heart in fact.
 8 MR EDELMAN: They did say it was purely chronological with
 9 no causal connotations because they thought that suited
 10 their counterfactual case better. But they have since
 11 accepted that it does have some causal connotation. But
 12 I don't think they backtracked from saying that it is
 13 a looser causal connection than proximate, as far as I'm
 14 aware. I have read all of this stuff once I am afraid,
 15 I have to confess. I have read it all once and not had
 16 the opportunity to study it in great detail.
 17 Zurich, RSA and Amlin say that it requires full
 18 proximate cause. We say on our argument -- we agree
 19 with Hiscox's approach. There can be no argument that
 20 a local disease being part of an aggregate pandemic that
 21 causes national response satisfies the test of response
 22 following the disease. But we would say even if it is
 23 proximate cause then in these particular cases it was
 24 the proximate cause.
 25 MR JUSTICE BUTCHER: So you agree with Hiscox's formulation,

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1 as you have put it, which is a causal, but not as
 2 directly causal as a proximate cause. That is your
 3 primary submission.
 4 MR EDELMAN: Yes. But I say it doesn't actually make any
 5 difference on the facts or to the counterfactual,
 6 because the counterfactual is all bound up with what the
 7 commercial purpose of these clauses is discerned to be.
 8 In trying to make up for some time I may be doing it
 9 a bit more piecemeal than I would, but can I move on to
 10 one further topic. I have two more topics to go but ...
 11 LORD JUSTICE FLAUX: How long do you think you need?
 12 MR EDELMAN: Yes.
 13 LORD JUSTICE FLAUX: I am only asking because we lost time.
 14 MR EDELMAN: I have certainly got one topic in 10 or 15
 15 minutes.
 16 LORD JUSTICE FLAUX: Why don't we try and finish that topic.
 17 I don't know about Mr Justice Butcher, I should have
 18 asked him, but I could sit until 4.30.
 19 MR EDELMAN: Yes, I have noticed. Is that too much of an
 20 indulgence?
 21 LORD JUSTICE FLAUX: No, because we lost 10 minutes with the
 22 break of the feed. So let's go on.
 23 MR EDELMAN: Yes.
 24 Ms Mulcahy is going to deal in detail with
 25 Orient-Express and general causation.

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1 LORD JUSTICE FLAUX: Let's do that tomorrow because that is
 2 might a meaty topic, and I would quite like to be fresh
 3 for that, speaking for myself.
 4 MR EDELMAN: I wasn't going to argue the law on that. She
 5 is going to do that tomorrow. I just wanted to make
 6 a point on policy cover.
 7 If my Lord could take another 15 or minutes or so, I
 8 will just show you some policies and show how the
 9 application of Orient-Express causes problems.
 10 I want to show you RSA2, which is page 17,
 11 {B/17/17}, which is a page we looked at before.
 12 You will see that it is damage to property caused by
 13 the following insured perils. We have amongst them
 14 explosion, storm, tempest or flood. That's 1 and 3.
 15 The BI section, if we move to page 35 {B/17/35}
 16 says:
 17 "In the event of damage to property used by you at
 18 the premises ... admitted liability ... causing
 19 interruption to the business which results in the
 20 reduction of gross profit ... we will pay you ..."
 21 Then it says that is what is paid in the event of
 22 damage to property.
 23 If we go back to the previous page {B/17/34}, you
 24 will see there is an adjustment:
 25 "... if the damage had not occurred."

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1 The question that I want to pose -- and it is one
 2 that I am happy to be able to send my Lords away to
 3 ponder over overnight -- is you have here a policy with
 4 a contemplated peril, the insured peril which insurers
 5 are so keen to have, to identify and say, well, that is
 6 what you take out of the counterfactual. What do you do
 7 here.
 8 Let me take some examples which we will all know
 9 about. Buncefield, the explosion, covered by this
 10 policy. Let's imagine, because in fact I think this is
 11 true, it caused damage to property including a warehouse
 12 800 metres away. What is the counterfactual for the
 13 purposes of the business interruption claim. Do you
 14 remove the damage to property, but leave the explosion
 15 and its effects everywhere as part of your
 16 counterfactual even though explosion is an express and
 17 contemplated insured peril. So the more devastating the
 18 explosion the less the business interruption cover, even
 19 though explosion is identified as an insured peril for
 20 the purposes of the property damage cover. We would say
 21 not. We would say that where the policy contemplates
 22 perils, which can comprise wide area events, then
 23 obviously when you are forming your counterfactual you
 24 must take into account the insured peril that the policy
 25 contemplates.

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1 But then that leads you to the question with
 2 Orient-Express. Does that mean, if that is right -- and
 3 you may say I am wrong, it would be a curious result --
 4 but if that is right it would mean that an insured was
 5 worse off with an all risks policy than he is with one
 6 like RSA2 confined to identified insured perils .
 7 MR JUSTICE BUTCHER: Just explain that for me, Mr Edelman.
 8 MR EDELMAN: Because what Mr Justice Hamblen was saying in
 9 Orient-Express is the hurricane is not an insured peril .
 10 He had an all risks policy . It is only the damage which
 11 is an insured peril . Where do I see in the policy that
 12 it says hurricane is an insured peril .
 13 So here we have got explosion is an insured peril ;
 14 it has caused the damage.
 15 Now on a very strict black letter interpretation of
 16 the policy, the business interruption cover says: "In
 17 the event of damage we will pay you your business
 18 interruption as a result of damage", and the adjustment
 19 clause, results which would have been expected if the
 20 damage had not occurred.
 21 But we do now have, you know, contrary to
 22 Orient-Express, a contemplated peril . We have the
 23 explosion in the property damage insuring clause . It is
 24 why you are in the business interruption policy in the
 25 first place, because you have got damage caused by

1 a qualifying peril .
 2 If I am right, and the natural conclusion, the
 3 natural construction of this is you don't leave the
 4 explosion in for the counterfactual -- of course, you
 5 know, if after the building has been repaired there is
 6 then continuing loss that is when it is no longer
 7 related to the damage to the building . I am talking
 8 about while the building is in pieces on the floor . Do
 9 you say, "Well, terribly sorry your building was
 10 destroyed by an explosion . I know we agreed to insure
 11 it and the business interruption resulting from the
 12 destruction of it by an explosion specifically as an
 13 insured peril ..."
 14 LORD JUSTICE FLAUX: That argument can't be right, in the
 15 example, because the property damage is caused by an
 16 insured peril , namely the explosion , you don't extract
 17 the explosion from your counterfactual analysis .
 18 MR EDELMAN: That is right. I agree.
 19 LORD JUSTICE FLAUX: But what you are trying to do is to
 20 say, "Aha, in that case Orient-Express can't be right
 21 because it is an all risks policy ." But it is an all
 22 risks policy that didn't cover against hurricanes .
 23 MR EDELMAN: It did. You have bought a better policy than
 24 RSA2, because instead of being confined to specified
 25 perils you had an all risks policy and hurricanes were

1 not excluded. But because you bought an all risks
 2 policy without, you know -- my Buncefield example, if
 3 this had been an all risks policy and there is no
 4 exclusion for explosion , you put the explosion in the
 5 counterfactual , because it is not an insured peril .
 6 But if there is an insured peril , you have got a
 7 narrower policy, it only covers you for insured perils
 8 A, B and C, and one of those insured perils occurs, you
 9 do get cover because it is an insured peril .
 10 It is utter nonsense. It is completely the wrong
 11 way round. You may say the answer is that you have got
 12 to put the explosion in the counterfactual even when
 13 it is an insured peril . But that is a coach and horses
 14 through the policy .
 15 It doesn't seem to have been -- I don't know whether
 16 it was argued, but whether it was or wasn't doesn't
 17 really matter. This is just practical insurance. It is
 18 not law. It is just practicalities . Are you really
 19 worse off with an all risks policy . It is not what
 20 insurers sell all risk policies to be narrower than
 21 a specified peril , or to provide narrower cover than
 22 a specified peril , if a non-excluded insured peril
 23 occurs.
 24 Now that gives you the clue as to what both the
 25 counterfactual for -- firstly it gives you the clue as

1 to the counterfactual for business interruption losses
 2 anyway, because you will see this clause, we are looking
 3 at it, let 's go back to page 35 {B/17/35}, this clause
 4 doesn't mention the peril at all ; it just mentions the
 5 damage. But it must contemplate encompassing within the
 6 damage the cause of the damage so that you don't create
 7 a counterfactual which doesn't have the cause.
 8 If that is right then you wouldn't expect a clause
 9 which is purely addressing quantification , the trends
 10 clause, to be introducing it by the back door purely for
 11 quantification .
 12 LORD JUSTICE FLAUX: How is damage defined in this policy?
 13 Is it not defined by reference to damage which is
 14 covered by the property damage sections?
 15 MR EDELMAN: "Damage", the definition, my Lord, is on page 9
 16 of this . {B/17/9}.
 17 LORD JUSTICE FLAUX: Okay.
 18 MR EDELMAN: If you go back to page {B/17/35} it is:
 19 "Damage to property for which we have admitted
 20 liability under section 1."
 21 LORD JUSTICE FLAUX: Yes. Yes. So it is ...
 22 MR EDELMAN: It is because it has been caused by an insured
 23 peril .
 24 LORD JUSTICE FLAUX: Yes. Yes, okay.
 25 MR EDELMAN: So one can have other examples. I will just

1 give you one more example which is another real life
 2 example: the floods in Cockermouth in Cumbria in 2009.
 3 If I could just have a few minutes, three or four
 4 minutes to finish this example, and then I have finished
 5 this point.
 6 LORD JUSTICE FLAUX: Yes, okay.
 7 MR EDELMAN: Imagine a clothes shop has flooded. Imagine it
 8 is insured under this policy. It covers for flood. On
 9 insurers' case, drawing an analogy with this case, it
 10 cannot recover business interruption losses for this
 11 broad flood of the town as vacants say, "Well, even if
 12 your property had not been flooded, the one property in
 13 Cockermouth not to have been flooded, no one could have
 14 got to your property anyway because the rest of the town
 15 was devastated. No business interruption loss for you."
 16 Whereas if there was a burst pipe or water main
 17 which only flooded the premises you get full cover. So
 18 the worse the inundation with water the less your cover.
 19 Imagine a café flooded in Cockermouth. They are
 20 entitled to the counterfactual, according to insurers,
 21 that the café is undamaged and still open for business,
 22 but the rest of the town is flooded. So they are able
 23 to serve all the rescue workers and the repair workers
 24 who have come in, and they have a complete monopoly, and
 25 they can recover as their business interruption loss the

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1 windfall profit they make from being the only café in
 2 Cockermouth, which is again wholly unrealistic.
 3 What we say is that when one is looking at these
 4 counterfactuals you need to take a rather more
 5 sophisticated approach. What you need to be doing is to
 6 look at what the policy is contemplating.
 7 If you decide that you don't want to say anything
 8 about Orient-Express and that all risks policy is just
 9 hard luck because it hasn't got insured peril, so be it.
 10 It seems commercially nonsensical but so be it. But
 11 when you do have perils, as we do, then those perils can
 12 not be diced up or subtracted for the purposes of the
 13 counterfactual. They have either happened or they
 14 haven't, and once they are there they are part of the
 15 causation test.
 16 LORD JUSTICE FLAUX: Yes.
 17 MR EDELMAN: That is the essential point, the central
 18 submission that I want to make.
 19 The last thing I will do tomorrow, which will take
 20 me only a few minutes, is just to point out to you a few
 21 inconsistencies in the ways in which the defendants have
 22 cherry picked bits from the clauses that they want to
 23 rely on, because that shows you the danger of carving up
 24 clauses and creating artificial counterfactuals.
 25 My Lord, sorry, I have taken you all the way up to

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1 4.30, but I hope that wasn't ...
 2 LORD JUSTICE FLAUX: That is absolutely fine. If that is
 3 a convenient moment we will break.
 4 Presumably in logistical terms we get another Skype
 5 invitation tomorrow morning so we just switch this off
 6 rather than leaving it running all night.
 7 MR EDELMAN: I think my understanding is that it is the same
 8 Skype invitation throughout.
 9 LORD JUSTICE FLAUX: It is the same invitation, yes.
 10 MR EDELMAN: So you find the same invitation that you had
 11 before; not a separate one each day.
 12 LORD JUSTICE FLAUX: Okay, that is fine.
 13 We will see you at 10.30 tomorrow morning. Thank
 14 you very much.
 15 (4.31 pm)
 16 (The hearing adjourned until 10.30 am on Tuesday
 17 21 July 2020)
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