IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (QBD)
FINANCIAL LIST
FINANCIAL MARKETS TEST CASE SCHEME
Neutral Citation: [2020] EWHC 2448 (Comm)

Appeal No. 2020/0179-0184

BETWEEN:

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

Appellants

-and-

THE FINANCIAL CONDUCT AUTHORITY

Respondent

[(1) HOSPITALITY INSURANCE GROUP ACTION]

[Intervener]

-and-

(2) HISCOX ACTION GROUP

Intervener

Appeal No. 2020/0177-0178

AND BETWEEN:

THE FINANCIAL CONDUCT AUTHORITY

Appellant

-and-

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

Respondents

-and-

[(1) HOSPITALITY INSURANCE GROUP ACTION]

[Intervener]

(2) HISCOX ACTION GROUP

Intervener/Appellant

THE RESPONDENT'S COMPOSITE CASE
IN RESPONSE TO THE CASES OF THE
SIX APPELLANT INSURERS

INTRODUCTION

1. COVID-19 and the resulting public health controls imposed by the Government have caused and are continuing to cause substantial loss and distress to businesses, particularly (but not solely) small and medium enterprises ("SMEs"); and as a corollary, to those individuals that depend on such businesses for their livelihoods. A large number of disputed insurance claims have been made by SMEs under policies covering business interruption ("BI") losses, particularly – and relevantly in this action – under extensions or other coverage clauses that do not require property damage, instead being focussed entirely on non-damage events causing an impact to the insured business. The Defendant insurers sold standard form insurance policies including BI cover principally to SMEs operating in the UK. As recorded at Judgment [7], the FCA has estimated that, in addition to the particular policies chosen for the test case, some 700 types of policies across 60 different insurers and 370,000 policyholders could potentially be affected by this test case.

2. It is against that background that the FCA, as Claimant in a claim brought under the Financial Markets Test Case Scheme, sought and continues to seek legal certainty for the benefit of all stakeholders, and to achieve this urgently in the public interest to facilitate the continuation of businesses to the extent they have survived in the meantime or to bring some relief and opportunity for those that have not. The FCA is seeking to remove the general 'road blocks' which have been advanced by insurers by way of general denial to claims irrespective of individual facts, so that policyholder claims can proceed to be considered and adjusted on their individual merits. The FCA therefore advances the policyholders' arguments on coverage and policy construction, supported on this appeal by one of the two groups of policyholders which the Court below permitted to intervene in the claim (with the FCA's consent).

3. The causation issues are the central issues in this dispute. Pre-trial, the insurers relied on their approach to these issues to justify refusing to pay, or paying only a minimal indemnity, under all of the wordings in dispute, even if and to the extent that cover was triggered by the COVID-19 events.

4. The Court below rejected the insurers' arguments in relation to a majority of the wordings.

5. The Court held that all the disease clauses other than QBE2-3[1] were intended to provide cover for a disease outbreak where the disease satisfies the policy requirement of presence within the

[1] Which the FCA appeals—see the FCA's Appeal Case.

relevant policy area. On appeal insurers repeat their unsuccessful argument that they only provide cover for business interruption caused by the portion of the outbreak which was within the relevant policy area.

6. The Court below also held that a number of the prevention of access and hybrid clauses were intended to provide cover for the combined effect of the ingredients of those clauses, all of which (including the COVID-19 outbreak) were to be subtracted in the counterfactual. On appeal insurers repeat their unsuccessful argument that a policyholder must show that the losses were proximately caused by, and would not have happened but for, only one of the ingredients of the clause – here, typically public authority action.[2]

7. The insurers appeal on all the wordings—disease wordings, and prevention of access and hybrid wordings—on which the Court found against them on these general causation points, and between them devote around 200 pages of written Cases and most of their 32 appeal grounds to doing so, but their arguments should be rejected here too.

8. The FCA has always been clear that the questions in issue are questions of construction. This case is not and never has been about manipulating the legal rules of causation as occurred in the extreme circumstances of *Fairchild,*[3] or about making new law with wide-reaching effects in tort law or contract law. It is not even about making new insurance law. It is and has always been about construing the scope of cover intended by the parties in these specific wordings (albeit wordings very widely used in BI cover) having regard to the nature of the risk insured.

9. At trial the insurers repeatedly sought to portray the FCA as adopting a 'heretical' and 'heterodox' approach to causation.[4] However, the Divisional Court accepted the FCA's approach, in essence agreeing that the true question was one of construction; that the FCA was largely right as to the answer to that question; and that this answered the counterfactual question which really turned on asking not whether the 'but for' test applied but (if and the extent that it does apply) '*but for what*'. The insurers have slightly tempered their language,[5] now that the FCA's arguments have been accepted as correct by the very experienced specialist insurance panel of

[2] The FCA does not appeal the decision that there is generally no cover on those prevention of access/hybrid wordings on which it lost, save to the limited extent that those wordings raise particular issues of the same type as other wordings on which the FCA appeals, as set out in its Appeal Case: Hiscox NDDA, MSAmlin1-3 (AOCA), RSA2, Zurich1-2, and Ecclesiastical1.1-1.2.

[3] *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2003] 1 AC 32 {E/17/304}.

[4] Insurers' causation skeleton paras 24 {G/11/110} and 95, MS Amlin's skeleton paras 150.1 {G/13/135} and 254.10, also Day4/145:18 {G/25/193}, Arch at Day6/161:13 {G/27/205}, Hiscox at Day6/10:3 {G/27/203}.

[5] The claim that the FCA's approach, now accepted by that panel, is 'heterodox' was gamely maintained in MS Amlin's permission to appeal application {A/7/166}, although not persisted in in the written Cases.

Flaux LJ and Butcher J,[6] but still suggest that the Court below reached conclusions that were "*unquestionably*" wrong.[7] In truth, despite the insurers seeking to dress this up as an attack on what they say was until now the 'leading authority' on the legal approach to causation and trends clauses[8] (the first instance decision of *Orient-Express*[9]), the crux of the dispute is that the insurers disagree with the Divisional Court's conclusions as to construction of the scope of cover intended by the parties, which resulted in the Divisional Court being able to decide the case independently of the decision of *Orient-Express* (whilst also disapproving it by way of an aside).

10. Construction is a question of law, and the Supreme Court will depart from the Divisional Court if it determines that it was wrong, but it is respectfully suggested that deference is due to the Divisional Court on this aspect given the experience of its members and that they were deciding a question as to the scope of cover intended to be provided by these insurance policies. Such deference is also merited in relation to the decisions of inextricability in applying causation.

Summary of the FCA's position

11. The FCA's position can be distilled to the following:

11.1. Insurers focused at trial on causation and in particular on an attempt to defeat all claims by an all–pervasive application of the 'but for' test. This attempt was rightly rejected by the Court below on the grounds that causation issues were largely determined by the true construction of the policies. In any event, the insurers' approach to causation was flawed.

Disease clauses

11.2. These notifiable disease clauses provide cover for the 31 human diseases (including SARS) which are made notifiable to the authorities in the UK, plus any new contagious diseases that might emerge and be added to the list by the authorities because of their threat to public health. The Court was correct that, properly construed, these clauses provide cover for the impact of the outbreak of such a disease provided it satisfies the policy requirements of the necessary presence within the specified radius. Accordingly, as a matter of construction the part of the disease outside the radius cannot be set up

[6] There is no need to set out the CV of these esteemed Judges, although it is worth mentioning that the causation chapter in Mance, *Insurance Disputes* (3rd ed, 2011) {E/48/1374}, referred to in the MSAmlin Trial Skeleton para 150.2 {G/13/136}, was written by Butcher J.
[7] MSAmlin Appeal Case para 99 {B/7/244}.
[8] The expression 'trends clause' is used throughout this written case as shorthand to refer to the trends or other circumstances clauses, as more fully explained at paragraphs 91 to 104 below.
[9] *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] EWHC 1186 (Comm) {E/31/921}.

as a rival cause. The suggestion to the contrary is merely a disguise for providing next to no cover at all for any serious outbreak of any such diseases. Insurers' approach is the wrong construction having regard in particular to the very nature of the notifiable diseases that are the subject matter of the cover, the way that authorities are empowered to act in relation to such notifiable diseases, and the practical impossibility of an insured establishing cover in many realistic day-to-day examples if the insurers' position is adopted. The insurers resort to deploying extreme examples: flights over certain regions; trawlers entering waters. This is an attempt to avoid confronting the fact that their approach involves substantive undermining of the cover provided. This illustrates the difficulties they face in arguing that the approach advocated by the FCA and adopted by the Court was wrong.

11.3. If the Court's approach is right, there is no further legal issue as to proximate cause or but for cause, whether as to connectors within the peril (e.g. between the disease within 25 miles/1 mile and the interruption) or between the peril and the loss. As is not disputed, COVID-19 was an effective and also a 'but for' cause of all the relevant interruption and losses. The Court was correct to hold that causation is satisfied either by reference to the outbreak of COVID-19 as a whole because it is indivisible ("*the proximate cause of the business interruption is the Notifiable Disease of which the individual outbreaks form indivisible parts*"[10]) or alternatively (albeit that the Court regarded this as being the less satisfactory analysis) by virtue of the individual occurrences of the disease each being a separate but equally effective cause of the national measures.

11.4. Further the Court correctly held that when applying the trends clauses (and the FCA contends that the 'but for' test provided for by trends clauses for the purposes of quantification does not arise at any other stage of the analysis) the loss was 'but for' caused by the insured peril or the interlinked concurrent causes, i.e. the totality of the outbreak. The Court also correctly held that there is no mandate to adjust the standard turnover under the trends clauses to assume the COVID-19 outbreak still existed outside the perimeter in the counterfactual world. This ultimately follows from the proper construction of the scope and parameters of the insured peril, which dictates what matters need to be disapplied when answering the necessary question of 'what would have happened' in order accurately to isolate the insured loss.

[10] Judgment [111].

11.5. If this Court was to hold that the approach of the Court below to construction was incorrect and that the disease clauses were only covering local cases or outbreaks of the disease, the Court's alternative causation analysis remains relevant and applicable, and the interlinked concurrent causes of the presence of the disease elsewhere cannot appropriately be used to eliminate or reduce cover, whether by any valid causation analysis or by application of trends clauses.

Prevention of access/hybrid clauses

11.6. As a matter of construction, the counterfactual in the 'but for' test applied in the trends clause (and it does not arise at any other point) involves the stripping out of the entirety of the composite peril including the underlying emergency/disease, as the Court correctly held. None of the (wholly conflicting) alternatives suggested by Hiscox or Arch are justified by the policy, or at all workable. These are policies that contemplate an underlying emergency/disease inextricably wrapped up in and causative of public authority action, and do not provide cover only to the extent that the public authority action incrementally reduced revenue beyond what would have happened had the public authority done nothing.

11.7. Following, for example, a closure of the business premises, one does not therefore adjust the loss of turnover calculation applied by the policy formula by reference to the effect that the pandemic would have had on the business had it not been forced to close, while assuming that all or most of the effects which led to the closure continue to apply.

Causation

11.8. There was much argument in relation to causation which on analysis concerns primarily coverage and quantification. The FCA adopts the Court below's conclusion that causation follows from true construction of the insuring clauses and identification of the insured peril. On the general issue of causation, the FCA accepts that a 'but for' test applies to the quantification of loss under the trends clauses, at least where they say so. However, that question of pure quantification is different to more fundamental concepts of causation in relation to the cause of the interruption the business suffered and certain other matters. For these matters 'but for' causation does not come into it; this is the territory of proximate cause (or some lesser test where the words of the policies mandate this). For the reasons set out at paragraphs 364 to 366 below, insurers' attempts to show that 'but for' causation pervades all applicable tests is simply wrong.

In any event, if and to the extent that a 'but for' test is to be applied, the critical question remains – 'but for what?' – and that was correctly answered against insurers.

Hiscox Grounds 6-8

11.9. Grounds 6-8 of Hiscox's appeal raise points of construction as to the meaning of "*occurrence*" in the Hiscox 1-3 hybrid clauses (Ground 6), the meaning of "*interruption*" in the 'stem' language of the Hiscox 1-4 BI clauses (Ground 7), and whether Regulation 6 of the 26 March Regulations is within the meaning of "*restrictions*" in the Hiscox 1-4 hybrid clauses (Ground 8). The Court was correct that:

(a) For the purposes of Hiscox1-3 (which contain no vicinity limit) the outbreak of COVID-19 in the UK qualified as "*an occurrence of a notifiable human disease*" from the date when it became notifiable in the UK; "*occurrence*" is not limited to something small-scale, local and specific to the insured;

(b) Construed in its contractual setting, "*interruption*" means 'business interruption' generally, including disruption or interference, and not just complete cessation of all the insured's business activities; and

(c) The Hiscox hybrid clauses are triggered where "*restrictions imposed*" by a public authority have the effect that an insured is unable to use insured premises for its business purposes (irrespective of whether the restrictions are specifically directed to that end), and accordingly Regulation 6 is capable of being "*restrictions*" in the relevant sense.

RSA3, General Exclusion L

11.10. The Court was correct that: (1) on the correct construction of RSA3, General Exclusion L does not exclude claims arising out of the COVID-19 epidemic, and (2) if it were necessary, this conclusion would also be reached by the application of the *contra proferentem* principle.

A. CAUSATION AND THE INSURED PERIL: APPLICABLE PRINCIPLES

Indemnity cover, intention and causation

12. A tortious or typical contractual obligation regulates conduct of the obligor. Tort law imposes an obligation to do or not do certain things; the contractual promisor agrees to do or not do certain things. If the obligation is breached, rules of law impose a secondary obligation to compensate. That compensation is dictated by the need to put the claimant in the position it would have been in had the obligation not been broken. Accordingly, the wrongful conduct of the defendant is removed from the counterfactual in order to identify the relevant loss. If a defendant has a contractual or tortious obligation to prevent an explosion, the counterfactual requires removal of the explosion because the wrongful conduct must be removed: it must be assumed that the defendant prevented the explosion. The question is not and could not be framed as whether but for the wrong there would have been an explosion harming neighbouring property but just leaving the claimant's property unharmed.

13. Yet even in the contractual and tortious context three matters are worthy of note. First, the extent of losses recoverable following the breach of a contractual or tortious obligation is a matter of construction of the contract and the assumption of responsibility, pursuant to rules of remoteness and scope of duty.[11]

14. Second, the rules of legal causation (and what breaks the chain of causation as a new intervening cause) are also subject to the parties' apparent intentions. Thus in *Stansbie v Troman*, a theft did not break the chain of causation between a decorator's negligent failure to leave the house secure when he left, and the loss. Counsel's argument that third party deliberate wrong-doing must be a new and independent cause breaking the chain of causation (as it would be in many other contract and tort cases) was rejected because the purpose of the contractual duty breached was "*to guard against the very thing that in fact happened*".[12]

15. Third, the law when applying the counterfactual looks to a realistic counterfactual, and asks what would *actually* have happened if the defendant had not committed the wrong, rather than

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[11] *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 {G/79/1572}; *Transfield Shipping Inc v Mercator Shipping Inc (The Achilleas)* [2008] UKHL 48 {G/88/1789}, [2009] 1 AC 61; *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146, [2016] Ch 529 {G/91/1867}.

[12] [1948] 2 KB 48 {G/82/1652}. See also e.g. *Rubenstein v HSBC Bank plc* [2012] EWCA Civ 1184 at para 103 {G/75/1514}: "*Mr Marsden, however, not only advised Mr Rubenstein on the investment of his capital, he recommended a particular investment. He, so to speak, put him in it. If such an investment goes wrong, there will nearly always be other causes (bad management, bad markets, fraud, political change etc): but it will be an exercise in legal judgment to decide whether some change in markets is so extraneous to the validity of the investment advice as to absolve the adviser for failing to carry out his duty or duties on the basis that the result was not within the scope of those duties.*"

positing a counterfactual created by a technical and artificial limited conception of what was the minimum wrongdoing. In negligence counterfactuals, the law asks what is the most likely non-negligent conduct by the defendant, not what is the minimum the defendant could have done without being negligent.[13] With counterfactuals in respect of alleged misstatements, the law asks either what would have happened if the claimant had made no statement, or what would have happened if the claimant had made a different statement, according to which of those two hypotheticals is more likely.[14] In contract cases, while in some circumstances the law will flesh out a counterfactual by assuming the defendant would have done whatever is least onerous (the *Lavarack* rule), "*it is not to be assumed that the discretion would have been exercised so as to give the least possible benefit to a claimant if such an assumption would be unrealistic on the facts*".[15]

16. A contract of indemnity, such as BI insurance, is different, because the insurer is not the cause of the harm. The insurer does not fail to prevent an explosion, but merely agrees to indemnify the insured for such loss as the policy may specify in respect of the harm suffered by the insured if it is caused by an insured peril, in this example such loss as is specified in respect of damage to property caused by such an explosion. The essence of the indemnity obligation is a voluntary agreement to cover losses in certain circumstances and not in others. The scope of this is a question of construction of the parties' intentions, in a purer or *a fortiori* sense than the *Achilleas* provides for ordinary contractual obligations: here the parties' intentions do not merely determine the scope of consequences for which a promisor will be liable if it breaches the primary obligation, but rather determine the very scope of the insurance where there is no real primary obligation of conduct. There is at heart no compensation in issue at all.

The hold harmless concept

17. It suits the insurers to try to characterise indemnity insurance as a classic breach of contract giving rise to compensation for loss because the but-for test is an undeniably central element of what it means to compensate for loss following breach of contract (and indeed is baked into the *Robinson v Harman* principle itself: "*the same situation… as if the contract had been performed*").

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[13] *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL) at 221-2 {G/79/1602}. Also *Nestle v National Westminster Bank plc* [1993] 1 WLR 1260 (CA) per Dillon LJ at 1268-9 {G/70/1276}, *Bolitho v City and Hackney Health Authority* [1998] AC 232 (HL) 240 (Lord Browne-Wilkinson) {G/48/438}, *Robbins v Bexley* [2013] EWCA Civ 1233 {G/73/1325}.
[14] See the cases and law summarised in N Venkatesan, 'Causation in misrepresentation: historical or counterfactual? And 'but for' what?' (2021) LQR forthcoming, section C (prepublication copy available) {G/118/2249}.
[15] *IBM United Kingdom Holdings Ltd v Dalgleish* [2015] EWHC 389 (Ch) per Warren J at para 142 {G/57/733}. An appeal was allowed on various issues, but the Court of Appeal did not opine on this specific point: [2017] EWCA Civ 1212. Further, and by way of example, the law will not assume that the defendant will cut off its nose to spite its face. *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278 per Diplock LJ at 294-6 {G/64/1139}, *Bold v Brough, Nicholson & Hall Ltd* [1964] 1 WLR 201 (Phillimore J) {G/47/416}.

18. Thus most insurers argue: "*[a]s with other claims for breach of contract, an assessment of what loss has been caused by the breach involves asking, as a matter of factual causation, what would the position have been 'but for' the occurrence of the insured peril and the loss caused thereby.*"[16]

19. This therefore requires a brief diversion into the nature of the indemnity insurance.

20. It is true that an insurance indemnity obligation is often characterised by law as a hold harmless obligation.[17] Leggatt LJ (as he then was) has described this as a promise "*that the insured will not suffer the specified loss or damage*", meaning that "*the occurrence of such loss or damage is therefore a breach of contract which gives rise to a claim for damages*" (rather than the indemnity being a primary obligation to pay money sounding in an action for debt and non-payment of which could give rise to consequential loss for late payment).[18]

21. But this can be misunderstood. It was carefully analysed and correctly explained by Sir Peter Webster in *Callaghan v Dominion Insurance* (a limitation case where the date on which the insurer's liability under a fire policy arose was important) (emphasis added):[19]

> "In my respectful view His Honour Judge Kershaw [*in Transcene Packaging Co. Ltd. v. Royal Insurance (U.K.) Ltd., [1996] L.R.L.R. 32*[20]] misunderstood or misread both the dictum of Lord Goff [*in The Fanti*] and the judgment of Mr. Justice Hirst [*in The Italia Express*]. In my view, neither of them were saying that the insurer in question had contracted that the contingencies would not occur; they were simply saying that immediately loss is suffered by the occurrence of the contingent event the insurer came under a liability to indemnify the insured against that loss. …
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> … Expressions such as 'to insure against' or to 'save harmless from' loss may be capable of misleading. It seems to me that the best way to define an indemnity insurance is that it is an agreement by the insurer to confer on the insured a contractual right which, prima facie, comes into existence immediately when loss is suffered by the happening of an event insured against, to be put by the insurer into the same position in which the insured would have been had the event not occurred, but in no better position.
>
> I note in parenthesis that when a policy expressly provides that the insured will be compensated by payment of an amount specified in the policy, usually expressed as a limited indemnity, so that the insurer is to be regarded as under a liability to pay a sum certain - or may be so regarded in certain circumstances - that liability also arises prima facie on the happening of the event. But I return to this policy which, although it obliges the insurer to pay 'such sums as may be agreed in accordance with the schedule', is clearly a policy of indemnity with limits, not a policy to pay a sum certain - see the words 'limit of indemnity' which occur more than once in the schedule. Unless, therefore, there are clear words in the policy which have a contrary effect, liability under

[16] Hiscox Appeal Case para 24 {B/6/163}. Also Arch Appeal Case para 20 {B/4/105}, MSAmlin Appeal Case para 89.3 and fn 39 {B/7/239}, RSA Appeal Case paras 63-4 {B/9/315}.
[17] *Firma C-Trade SA v Newcastle Protection and Indemnity Association ('The Fanti' and 'The Padre Island')* [1990] 2 AC 1 {F/30/587}.
[18] *Sartex Quilts v Endurance Corporate Capital Ltd* [2020] EWCA Civ 308 per Leggatt LJ at para 35 {E/37/1053}. In *Sprung v Royal Insurance (UK) Ltd* [1999] 1 Lloyd's Rep. I.R. 111 {G/81/1639} it was held that there was no remedy in damages for late payment of an insurance indemnity because damages are not available for the late payment of damages. The effects of the decision have been partly ameliorated by s13A Insurance Act 2015.
[19] [1997] 2 Lloyd's Rep. 541 at 544 {E/12/200}.
[20] Holding that an insurer does not necessarily contract that the insured contingencies will not occur.

> this policy, being a policy of indemnity insurance, arises immediately loss is suffered as a result of the happening of the relevant event.
>
> Before considering whether there are sufficiently clear words in this case to take this policy out of the general principle, it is necessary to bear in mind the passage in the judgment of Mr. Justice Megaw in the Chandris case at p. 74 to the effect that the quantification of the amount of the plaintiff's claim is not a pre-requisite to a cause of action. Thus there is a primary liability, that is to say to indemnify, and a secondary liability, that is to say to put the insured in his pre-loss position, either by paying him a specific amount or it may be in some other manner. The fact that the insurer has an option as to the way in which he will put the insured into his pre-loss position does not mean that he is not liable to indemnify him, in one way or another, immediately the loss occurs."

22. A claim under an indemnity policy is a claim for unliquidated damages (save for a valued policy which is a claim for liquidated damages). But the breach is not the event itself—the insurer does not promise to prevent the occurrence of the event or warrant that the event will not happen. There is no breach without loss and there is no promise that the event will not occur. The breach is in failing immediately to indemnify by paying the amount required by the policy. The "fiction" that is often referred to in this context is a recognition that in practical terms the insurer cannot immediately indemnify because the loss will need to be notified and assessed.

23. There is often no such fiction in relation to a liability policy like *The Fanti*. The minute the insured's liability is established and ascertained by judgment, settlement or award, the obligation to indemnify arises, can be quantified by reference to the judgment, settlement or award and will often be discharged directly by the liability insurer. In a damaged building case (such as *Callaghan*) the quantum is not fixed so easily, but the obligation nevertheless arises immediately upon the suffering of loss.

24. But the key point is that in no case is the scope of the indemnity measured by applying a 'but for' causation test to quantify compensation for loss resulting from breach. It is the policy not the law that decides what is 'loss'. In a damaged building property cover case one does not ask what loss would not have been suffered had the building not been damaged—if that were the case then the recovery would include BI and other consequential losses without the need for a BI extension. Rather the breach is in failing to indemnify the insured against such loss proximately caused by an insured event *as falls within the scope of and is quantified by reference to the cover*—in a property damage case, the cost of rebuilding or repair, whether as new or in the pre-damage state, as specified, and any other identified associated costs (but not BI or other consequential loss without an extension to that effect). There is no 'but for' question here, merely an obligation to pay the indemnity for the losses within the scope of the cover.

25. In a BI case, 'but for' does creep in, although this is not because of *Robinson v Harman* but rather (and only) because of the nature of the indemnity. The 'but for' principle arises because the

nature of BI cover is that it is not an indemnity for a set of costs or liabilities to third parties, but rather an indemnity against a loss of profits that would not have been suffered ordinarily. The 'but for' principle therefore arises because the nature of the particular cover requires one to identify, in order to calculate the loss, what profits would have been achieved ordinarily (i.e. without the insured peril) so that the loss of profits component that is insured can be isolated and identified. Hence the quantification and trends clauses specify a way of measuring lost profits of the business during the relevant period (by reference to standard turnover, adjustments for trends and circumstances, with a 'but for the insured peril' principle at the heart of things).

26. It is the contract of insurance, not ordinary contractual compensation principles, that quantifies the unliquidated sum due under the indemnity. That said, whether or not the but for test arises as a matter of the contract in this way, or as a matter of causation within the principles of compensation for breach of contract (the insurers say it is part of proximate cause) may not matter much, because in both cases it would be dependent upon the express and implied scope of rights and obligations in the insurance.

Proximate cause

27. The test of proximate cause—of whether property damage in a property case, or lost revenue in a BI case, is proximately caused by an insured peril—is a separate question, although itself also a matter of the parties' intention.[21] It is subject to the default rule of proximate causation as codified in section 55(1) of the Marine Insurance Act 1906 (which the insurers tried at trial and without authority to supplant with or make subject to a 'but for' causation test). That question is one of construction but does not include a 'but for' test.

28. At trial, insurers tried to introduce the 'but for' test into this stage of the analysis but were unable to come up with any authorities (other than *Orient-Express*, which will be addressed later in these submissions) which actually resolve a question of whether a loss was proximately caused by a peril by reference to a 'but for' test rather than the statutory proximate cause test. MSAmlin has taken responsibility for insurers' general causation arguments. It has sought to advance this argument in its Appeal Case,[22] but the authorities and textbook references cited do not support its proposition.[23]

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[21] *Nelson v Suffolk Insurance Company* 8 Cush 377 (1851) per Fletcher J at 490 {G/69/1252}, *Becker Gray & Co v London Assurance Corp* [1918] AC 101 at 112-4 {E/10/183}, *Leyland Shipping Co Ltd v Norwich Union Fire Ins Sy Ltd* [1918] AC 350 (HL) at 365 {E/27/891} and 369.
[22] Paras 68-71 {B/7/231}.
[23] See further paragraphs 364 and following below.

Introduction to causation issues

29. The insurers and the FCA agreed at trial and continue to agree that the causation questions are determined primarily by construction and the parties' intentions, and this was a central feature of the insurers' Joint Trial Skeleton on Causation.[24] This much is common ground.

30. There are three stages at which causation-type issues arise. The first two determine whether the policy responds at all. The third quantifies the indemnity.

31. The **first** is as to the connectors within the defined trigger in the wordings. The trigger provides for a combination that must have occurred for the policy to respond, and also provides linkages that must be satisfied. For example, in a prevention of access clause, the public authority restrictions must be "*as a result of*" or "*following*" the occurrence of a notifiable disease. These are causal terms but, placed where they are between elements other than loss and the peril, do not import a full proximate cause test (which would otherwise require that the proximate cause test was applied multiple times, as regards the link between each element of the composite peril), nor do they import a but for test: see Judgment [95, 147, 194, 498]. See further below paragraphs 361ff below.

32. The **second** is as to the causal link between the insured peril and the loss. This is, by default and subject to contrary agreement, the proximate cause test in section 55(1) of the Marine Insurance Act 1906. It is the primary question of causation in insurance: Judgment [523-4]. If this is not satisfied then the policy is not triggered. But this does not import a 'but for' test, which comes in at the quantification of the indemnity/damages stage, stage three. Insurers seek to rely on the proximate cause test, in particular saying that the test of 'but for' causation is an implicit part of that test, despite none of the insurance case law (other than *Orient-Express*) referring to the 'but for' test as part of proximate cause.

33. The **third** is as to the test for the quantification of the indemnity, set out explicitly in trends or circumstances clauses and related quantum machinery in all these wordings but which would arguably apply implicitly if it were not set out. This is the 'but for' test, with the key issue being: 'but for what'?. As set out immediately below, this is largely resolved by construction of the insured peril rather than any questions of law including as to concurrent causation.

[24] Paras 22.4-9{G/11/108}, 25.7.

The 'but for test' is resolved by identification of the insured peril

34. The Court concluded that the questions of causation and the counterfactual were indeed largely questions of construction. After spending the vast majority of the judgment construing the policies and scope of the insured perils, the Court commented that once one has done that the causation issues (which has been the focus of insurers' submissions) *"largely answer themselves*" (Judgment [110, 164]), because they answer the real causation question in relation to the counterfactual, which is: "*but for what?*" (Judgment [530, 387]). The FCA summarised these findings in paragraphs 8 to 15 of its Appeal Case.

35. That this was the correct approach, and that these issues turn on the construction of the policies, can hardly be denied, given that it is not seriously disputed that the result arrived at can be reached by express drafting. The question is merely one as to the proper interpretation of elements in the peril.

36. Once the scope of the peril has been identified, and (with it) what is and is not intended to be covered, the 'but for' test applicable for calculation of the quantum of the indemnity (under the applicable trends clauses) is applied pursuant to that intended peril.

Disease clauses

37. Thus, in relation to disease clauses specifying that the disease occurs within 25 miles of the property, the insurers accept that the issue is one of policy interpretation. On the proper construction of the wordings, is the cover for: (i) an outbreak of a notifiable disease, provided that the outbreak was present within 25 miles, and regardless of whether it also extended beyond 25 miles; or (ii) the consequences of a disease to the extent that it is only within (but not beyond) 25 miles? The Court accepted the FCA's construction, which was the former, whereas the insurers contend for the latter. The but for test is then straightforward: the cover is for the outbreak as a whole, so the whole outbreak must be subtracted in the counterfactual.

38. The alternative to that reasoning (as the Court found) is that the disease within 25 miles is a separate but equally effective concurrent proximate cause with all other occurrences of the disease. The proximate cause requirement is therefore satisfied. And on this analysis, when applying the 'but for' test for quantification under a trends clause (or otherwise), it is necessary to subtract all the set of interlinked concurrent causes.

39. As to this question of construction (addressed in more detail in relation to disease clauses below in section D), the Court's primary findings were that the cover is for the disease outbreak as a

whole,[25] and is not confined to interruption caused by the 'part' of the outbreak which is inside the radius.[26] Accordingly, there is cover for the disease if it has a local presence,[27] and the radius qualifier is merely "*adjectival*".[28]

40. This is the correct and only sensible construction. These are covers for existing notifiable diseases, which comprise 31 of the thousands of diseases that exist, and which are considered by authorities to pose a sufficient public health threat that they require early and mandatory identification and reporting: see section C below. All of these diseases do not just occur in isolated instances, but have outbreaks.[29] It is common ground that these clauses also include cover for unknown future diseases added to the list during the lifetime of the policy, as SARS was most recently prior to inception of these policies, and COVID-19 was afterwards.[30]

41. The nature of infectious or contagious diseases is that cases in different areas will be related to each other, having spread from one source to multiple individuals in different places. As people move, the disease moves with them. Some of these diseases, such as SARS, could spread across the country. Notifiable diseases are therefore contemplated to possibly give rise to epidemics.[31] Accordingly, they may well lead to a public authority reaction to the entire outbreak (not only parts of it) and can trigger a national or regional response, as opposed to a local one alone.[32] Given public authorities will react to outbreaks as a whole (and not only parts of them), it will be impractical and often impossible to ask: which part of the outbreak was the public authority responding to, and how would it have acted if the outbreak had a 50-mile-wide area at its centre with no cases?[33]

42. None of this is believed to be disputed. It means that the parties would not have intended that the counterfactual should require consideration of these impractical or impossible questions. By contrast, the insurers' argument is designed to reduce cover for notifiable disease to an obscure very limited range of minor outbreaks, excluding all widespread outbreaks of the

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[25] Judgment [532, also 110, 142-3].
[26] Judgment [107, 142, 160-2, 227].
[27] Judgment [102, 109, 142, 161, 226].
[28] Judgment [226].
[29] All of the disease wordings other than QBE3 expressly refer to 'outbreaks' when defining notifiability by reference to such diseases "an outbreak of which" it has been stipulated must be notified to the relevant authorities.
[30] See, further, Judgment [103, 116, 132]. RSA4 expressly refers to this by the words "*any additional diseases notifiable under the Health Protection Regulations (2010), where a disease occurs and is subsequently classified under the Health Protection Regulations (2010) such disease will be deemed to be notifiable from its initial outbreak*". But the anticipation of future diseases is inherent in all the wordings which refer to disease that are notifiable under the relevant legislation, which allows for the possibility of further diseases being added to the list.
[31] Judgment [116, 132, 143-4, 160, 359, 370].
[32] Judgment [103-4, 138, 160, 228, 370].
[33] Judgment [160].

disease. This sort of cover, under which an insured's only hope is that where there is a wide outbreak the public authorities take no action,[34] could not have been intended and would be anomalous.[35] The fortuity covered is therefore the disease outbreak inside and outside the radius, provided it comes within the radius.

43. There is nothing novel or unorthodox in construing a policy as including a qualifying condition the satisfaction of which is required for cover to respond (here the occurrence of the disease within the radius), but which does not circumscribe the scope of the insured peril for causation purposes. This occurs with the requirement that a disease be notifiable. The insured peril is any disease which is or has become notifiable, that being a hard-edged, adjectival qualification. If insurers were to be consistent with their approach to perils comprising multiple elements, they should say that the peril is a composite one of (1) disease plus (2) notifiability – and that there is only cover *to the extent that the disease is notifiable*. In other words, the proximate cause question would be whether the *notifiability* element of the disease proximately caused the loss, and the counterfactual question would be whether but for the disease being notifiable there would have been loss. In other words, would customers have stayed away or the public authority have responded if the disease had happened in just the same way but not be made notifiable? But insurers (rightly) do not argue this because it would be to misconstrue the cover. *Providing that* the disease is notifiable, there is cover for the disease, not merely for the disease *to the extent that it being notifiable incrementally increased the loss.*[36]

Prevention of access and hybrid clauses

44. As to composite perils like prevention of access and hybrid clauses, it is a matter of construction which (if any) of the elements of the composite peril are 'adjectival', and which define the scope of the insured peril for causation purposes, or how one applies causation tests to a composite peril. Is there any reason why a business loss would not be said to be proximately caused by prevention of access due to government action due to an emergency, where that combination led to the business being ordered to be closed? Can the emergency itself be a rival proximate cause? Further questions arise when considering the quantification of the indemnity. Is the

[34] Judgment [162].
[35] As the Court found: Judgment [162], [228].
[36] Similarly, consider the Hiscox NDDA clause which responds to interruption caused by an incident which results in denial or hindrance of access *for more than 24 hours*. Unless the 24-hour minimum time is satisfied, there is no cover. This is part of the conditions for cover. But no one would suggest that the insured peril itself incorporates the 24-hour minimum for causation purposes, i.e. no one would contend that (i) loss is only recoverable where and to the extent that the loss was caused by the interruption *being over 24 hours*, (ii) but for the insured peril there would still have been a restriction for 24 hours, or that (iii) the qualifying condition operates in effect as a retention such that the insured covers the first 24 hours of restriction.

target those losses that were but-for caused by all of the elements of the trigger acting in combination, including the emergency, where the combination was triggered? Or is it only those losses that were but-for caused by the prevention *disregarding the emergency*, so when a business has had to close, one compares the actual losses with the losses which would have been suffered by reason of the emergency alone?

45. In this situation, it is important to consider how the wording works: what would it mean to only cover loss to the extent that it would not have happened had there not been government action? Is it realistic to conduct such a separation exercise, and would that be a meaningful cover when what the insuring clause is contemplating are emergencies severe enough to entail government action?

46. These are points one can argue as a matter of construction, and the Court below accepted the FCA's conclusions in this regard. But what is not a valid or worthwhile exercise is merely asserting (as Hiscox and MSAmlin did at trial,[37] and continue to do now[38]) that one or other part of the composite peril is the 'essence' or 'core' of the insured peril by way of some self-evident truth. There is no shortcut to performing a full construction exercise on the peril.

47. The exercise produces the answer the Court reached, that the composite peril includes the entire underlying disease/emergency, and no part of that or its effects can be treated as a competing proximate cause or but for cause.

Orient-Express Hotels Ltd v Assicurazioni Generali SpA

48. The only cases of any close, albeit indirect, relevance to the present case are *The Silver Cloud*[39] and *Orient-Express*.[40] The former is a non-damage BI cover composite peril case like the present case, and is discussed below at paragraphs 451ff and especially paragraphs 451ff (as it is most relevant to composite prevention of access/hybrid perils). *Orient-Express*, on the other hand, is a case with the simplicity of an examination problem. It has a basic fact pattern (hurricane hits New Orleans, and New Orleans hotel claims BI losses) that would appear to drive only one solution—like the mountaineer example in *SAAMCo*—with the quirk that the Court did not adopt that obvious intuitively right (because legally right) solution. It found instead that a damage BI cover triggered by hurricane damage only responded to the extent that the loss

[37] Hiscox Trial Skeleton paras 149 {G/8/53}, 338 and 340; MSAmlin Trial Skeleton paras 75 {G/13/131}, 77, 137, 139; Day5/66:8-14 {G/26/197} (Hiscox).
[38] Hiscox Appeal Case paras 4 {B/6/156} and 35, Hiscox Ground 1, MSAmlin Appeal Case para 49 {B/7/222}.
[39] *IF P&C Insurance Ltd (Publ) v Silversea Cruises Ltd*, [2003] EWHC 473 (Comm) (High Court) {E/18/392} *and IF P&C Insurance Ltd (Publ) v Silversea Cruises Ltd*, [2003] EWHC 473 (Comm) (Court of Appeal) {E/19/422}.
[40] [2010] EWHC 1186 (Comm), [2010] Lloyd's Rep IR 531 {E/31/921-932}.

would not have resulted without the damage to the premises *but leaving the effects of the hurricane elsewhere*. The arbitral panel felt driven to this conclusion (perhaps by the way in which the case was argued before them), and Hamblen J was unable to find an error of law in their reasoning. Flaux LJ and Butcher J did not consider that the law compelled this conclusion, and the common sense answer was also the legally-correct answer. The FCA respectfully agrees.

49. This was a decision of Hamblen J, as he then was, on a s69 Arbitration Act 1996 appeal from an arbitral tribunal of Sir Gordon Langley, George Leggatt QC (as he then was), and John O'Neill. To overturn the award, the appellant needed to persuade Hamblen J that the panel had made an error of law. The full arbitral award and underlying policy are not available, but the judgment of Hamblen J is fairly detailed and was considered at length by Flaux LJ and Butcher J at Judgment [504-529]. This Court will no doubt be considering it in some detail, and so the temptation to address every detailed point of the judgment will be resisted.

50. A luxury hotel chain with a hotel in New Orleans submitted a BI claim following Hurricanes Katrina and Rita in which the hotel, like much of New Orleans and the area beyond the city, suffered significant property damage necessitating its closure during September and October 2005.

51. The insuring clause agreed to indemnify "under the Material Damage and Machinery Breakdown Sections against direct physical loss destruction or damage except as excluded herein to Property as defined herein such loss destruction or damage being hereafter termed Damage". This was an all risks policy, meaning that rather than there being cover for property damage resulting from a nominated exhaustive list of causes, there was cover for property damage resulting from any cause other than excluded causes. As the Court below observed at Judgment [523]:

> "It was an all risks policy which thus insured against material damage and consequent business interruption caused by a fortuity unless it was excepted. It did not insure against Damage in the abstract but Damage caused by a covered fortuity, here the hurricanes, which were not excepted."

52. As to BI cover, the insuring clause also covered "*loss due to interruption or interference with the Business directly arising from Damage*" and the BI insuring clause provided cover if the property "*suffers Damage as defined…and the Business be in consequence thereof interrupted or interfered with*". It should be noted at the outset that "*Damage*" as defined in the policy incorporated the cause of the damage through the words "*except as excluded herein*". This is unsurprising because the BI cover in respect of damage to the insured's property will only ever apply to damage caused by an insured peril under the material damage section of the policy.

The Court's reasoning

53. The Court agreed with the FCA's submissions, and all appealing insurers appeal against its conclusions, although MSAmlin appears to be taking the lead on the argument.[41] The core of the Court's reasoning was as follows.

54. First, the insured peril under this BI cover was not merely interruption caused by damage to the premises. Rather, it was interruption caused by damage to the premises caused by hurricane, because Damage as defined was damage caused by hurricane or other fortuity: "*The hurricanes as the cause of the Damage were an integral part of the insured peril, not separate from it"* (Judgment [523], also [345]).

55. In other words, the peril was a form of composite peril in that it included separate elements, and moreover (and which is important for construction purposes) there would always be understood to be an underlying cause including hurricanes.

56. Second, the correct test to apply when considering cover (as opposed to quantification of loss) is the proximate cause test rather than the 'but for' test adopted by Hamblen J, and that was satisfied in *Orient-Express*. Judgment [525]:

> "If the question had been asked what was the proximate cause of the loss claimed, it seems to us that the correct answer would not have been business interruption arising from Damage in the abstract but business interruption arising from Damage caused by the hurricanes as a covered fortuity. If the policy wording had contained express references to the fortuities for which cover was provided and had identified Storm as one of those fortuities, it seems to us unarguable that the insured peril would be anything other than the business interruption arising from Damage as a consequence of the hurricanes which constitute Storm and we cannot see that it should make any difference in principle to the correct assessment of the insured peril that the policy was an all risks one which did not need to list covered fortuities."

57. Third, on the proper construction of the trends clause (which included the words "*so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the Damage would have been obtained during the relative period after the Damage*"), given that the hurricanes were an integral part of the insured peril, the counterfactual was one where both the damage to the hotel and hurricanes and their effect generally were to be stripped out: Judgment [527].

58. Fourth, these conclusions were supported by the fact that it was inevitable that hurricanes would cause wider damage, which on the insurers' construction would have to be kept in the counterfactual, and therefore the cover would be "*illusory*": Judgment [526].

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[41] Arch Ground 3, Argenta Ground 6, Hiscox Ground 3, MSAmlin Ground 3 ('the second issue' within it), QBE Ground 4 and RSA Ground 7.

59. Pausing there, insurers say that this is just tough as it dictated by the policy,[42] but that begs the question, and ignores the fact that one takes into account the results of competing constructions when deciding what the policy actually means. Moreover, of course, the wording of the policy does not dictate the insurers' result because nowhere is it said that loss must be solely caused by property damage, or that the but for test is applied to property damage irrespective of the underlying cause—the word "Damage" as defined in the policy points the other way.

60. Insurers also say that it would be more accurate to describe the cover in a case of wide area damage as not illusory, but rather *either* illusory *or* as providing windfall benefits (of the monopoly of an undamaged hotel).[43] They are right about this, but it only serves to underline, not undermine, the case that this construction cannot have been intended by the parties. It would mean that each hotel in the New Orleans region could potentially have received a windfall benefit on the 'but for' hypothesis that it would have been the only hotel left standing in the area, even though they were all damaged. That would be a ridiculous state of affairs.

61. Fifth, the Court would have concluded that *Orient-Express* was therefore wrong and declined to follow it, save that it is clearly distinguishable as being concerned with a different type of insured peril, and does not give a particular meaning to a specific clause which is of relevance here: Judgment [529, also 79].

Summary of the FCA's case as to Orient-Express and its relevance

62. Before touching on a few other aspects of the case, and arguments of insurers, it is worth setting out the FCA's position on the correct general approach to *Orient-Express*.

63. There is nothing radical about the approach of the Court below in this case, and indeed two of the three insurers with truly composite perils in this appeal (the prevention of access and hybrid clauses) advocate an approach to the counterfactual that is inconsistent with *Orient-Express* (at least if *Orient-Express* is comparable to the present case).[44] In the present case, RSA says that the correct counterfactual under RSA1 where cover is for BI loss "*as a result of closure or restrictions placed on the Premises as a result of a notifiable human disease manifesting itself at the Premises or within a radius of 25 miles of the Premises"* involves removal of not only the closure restrictions (equivalent to the property damage in *Orient-Express*) but also the entirety of the disease within 25 miles

[42] Hiscox Appeal Case para 95 {B/6/180}.
[43] MSAmlin Appeal Case para 116.1 {B/7/250}.
[44] If the 'all risks' and particular wording issues in *Orient-Express*, can explain the inconsistencies in RSA and Hiscox's approaches to that case and to this case, then they would also distinguish *Orient-Express* and prevent it being an authority that supports insurers' arguments in this case.

(equivalent to the hurricane in *Orient-Express*).[45] Hiscox in the present composite peril case argues that the counterfactual for its hybrid clause does not leave the underlying stated cause of the restrictions (the notifiable disease outbreak) in the counterfactual, but rather that it must be removed 'insofar as' it resulted in the restrictions.[46]

64. It therefore appears that the insurers would agree that if the *Orient-Express* clause expressly stated it covered BI 'loss due to interruption or interference with the Business directly arising from Damage [resulting from hurricane or other Storm]' (which would make it a better analogy for the present case; although on a proper construction, it did actually say that), then the hurricane, as one element of the composite peril, would have to be stripped out of the counterfactual entirely (RSA) or insofar as it led to property damage (Hiscox), i.e. at least these insurers should agree by their own logic that *Orient-Express* was wrong.[47]

65. Of course, *Orient-Express* did not expressly refer to the hurricane in the BI cover clause, and the property damage section was on an all risks basis. The insurers accept that the position is the same as if the property damage cover listed out perils including hurricanes expressly,[48] and that under the property damage cover the hurricane was part of the insured peril: "*[t]he relevant insured peril under the material damage section was the hurricanes".*[49]

66. As the Court below held, *Orient-Express* is distinguishable in being a different policy provision on different facts. The BI cover in issue there was property BI and the question arose as to whether the hurricane peril under the property damage cover was incorporated with the specification of Damage in the BI cover clause and trends clause. The FCA and the Court below said yes, in part because the term Damage used in the BI cover was expressly defined in the property damage cover clause as "*direct physical loss destruction or damage except as excluded herein to Property as defined herein*", which refers to the fact that it is all-risks save for excluded perils.

67. The insurers argue that it is not, and that although the property damage peril is hurricane causing damage, for the BI cover the peril is property damage causing interruption, even though of course that property damage must fall within the property damage cover (i.e. result from a non-excluded peril) and so, in MSAmlin's words, "*inherent within the definition of Damage was an*

[45] See below paragraph 424.
[46] See below paragraphs 430ff. In relation to *Orient-Express*, Hiscox inconsistently states that only the damage should be stripped out (Hiscox Appeal Case para 92.3 {B/6/180}).
[47] Arch would disagree—it only strips out prevention of access in its counterfactual, see below paragraph 412—and the other insurers do not on this appeal consider composite perils like this. The same issue does not arise for disease clauses.
[48] MSAmlin Appeal Case para 115 {B/7/250}.
[49] MSAmlin Appeal Case para 112.2 {B/7/249}, QBE Appeal Case para 119.1 {B/8/287}.

identification of what physical damage was insured, i.e. only physical damage caused by a fortuitous, non-excluded cause".[50] It seems therefore that the insurers accept that the BI trigger is 'interruption caused by property damage caused by hurricane or other non-excluded peril', but merely argue that on the proper construction the hurricane element of the composite peril is to be ignored or is merely adjectival.[51]

68. But the point for present purposes is that this is a distinguishing feature—it is why the Court was right to say that the *Orient-Express* peril was not a composite/compound peril of the sort in the present case (Judgment [529]), because it was not a specified peril expressly including the underlying cause within a single cover clause as those in the present case are. If, contrary to the FCA's case and the Court's view, the decision in *Orient-Express* was right, it would nevertheless say nothing about the present case where the perils expressly do include the underlying disease.

69. The FCA is of course aware that Lords Hamblen and Leggatt are members of the present Supreme Court panel, although it is of note that Hamblen J granted permission to appeal his own judgment.[52] But, quite apart from the fact that judgments once handed down cease to be personal creations of the judges and become part of the body of law to be interpreted objectively, *Orient-Express* was a decision made ten years ago after argument in (according to the report) a single day's hearing. In addition, the way in which the Court in *Orient-Express* approached the issues would have been constrained by the way in which the case had been argued (by different counsel for the insured) before the arbitral tribunal and the point has since attracted greater attention, including subsequent academic commentary.

70. The FCA therefore invites the Supreme Court to agree with the Court below that *Orient-Express* was wrong, alternatively is distinguishable.

Window damage

71. MSAmlin and QBE advance an example they contend shows that the FCA and Court's approach is flawed. This is their example of a hurricane causing "*a single broken window*", which they say on the FCA and Court's approach would give rise to recovery of all BI lost profits resulting from the hurricane.[53]

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[50] MSAmlin Appeal Case para 112.6 {B/7/249}, QBE Appeal Case para 119.1 {B/8/287}.
[51] Cf. MSAmlin Appeal Case para 112.7 {B/7/249}, although it is not put in quite these terms.
[52] The case settled before the appeal was heard: R Merkin, 'The Christchurch Earthquakes Insurance and Reinsurance Issues' (2012) 18 Canterbury LRev 119 at 139 {G/119/2307}. In addition, Hamblen J in *Orient-Express* para 33 noted "*in my judgment as a matter of principle there is considerable force in much of OEH's argument*" {E/31/928}.
[53] MSAmlin Appeal Case para 116.3 {B/7/251} and 113, QBE Appeal Case para 119.2 {B/8/288}.

72. This is a surprising suggestion for insurers who have spent months and dozens of pages considering composite perils and the *Orient-Express* decision. In other words, it is wrong.

73. Under the Generali policy in *Orient-Express*, the composite peril on the FCA and Court's approach is interference or interruption with the hotel business, directly arising from physical loss, destruction or damage to the insured's hotel, caused by hurricane (or other non-excepted peril).

74. The broken window example ignores the necessary causal link between the operational impact on the hotel and the damage. The policy is never triggered on insurers' example because interruption and interference to the business does not directly arise from the property damage (a single broken window). The policy is not triggered merely because the hurricane interrupts the business. Nor is it triggered if the hurricane interrupts the business and there is some property damage. All the elements of the trigger must be satisfied in the correct combination before there is cover and one can get into quantifying the indemnity.

75. A better example is what happened: property damage sufficient to cause an interruption. In *Orient-Express*, the hotel was closed for repairs for two months until it reopened on 1 November 2005.[54] As it was closed for business for repairs, it had no revenue during the two-month period when repairs were being carried out. Its BI loss fell to be calculated presumably by reference to its turnover in the equivalent two-month period in the previous year (the definition of Standard Revenue does not appear in the judgment but this would be the usual approach), in which presumably it was operating normally. The question—and the only question—should be whether one has to adjust the total loss of revenue that is by default calculated against the prior year on the basis that what had caused the damage to the hotel and its necessary closure in order for repairs to be carried out, namely the hurricane, also caused damage in the surrounding area which would have prevented or deterred people from going to the hotel even if it had not been damaged; and whether this was a trend of the business, or variation or special circumstance affecting the business.

76. The insurers say yes, the FCA and Court below say no.

Further points on Orient-Express

77. Insurers say that it is unfair to say that the correct test to apply when considering cover (as opposed to quantification of loss) is the proximate cause test rather than the 'but for' test

[54] Para 4 {E/31/923}.

adopted by Hamblen J in *Orient-Express* (Judgment [525]), because Hamblen J referred to proximate cause at [29] in *Orient-Express*. However, that was merely a citation of the submissions made. Furthermore, in that paragraph the point is made by Hamblen J that the insured could not point to any insurance cases which held it to be inappropriate to apply the 'but for' test, whereas at trial Butcher J in the course of argument posed the more appropriate question to insurers' counsel, namely whether there are any insurance cases in which a court has applied the 'but for' test rather than or as part of the statutory proximate cause test.[55] The best that the insurers can do in response to that challenge are the authorities at paragraph 69.1 of MSAmlin's Appeal Case, which do not support the proposition and are discussed further below at paragraphs 364ff.

78. There are a number of other points that must be taken into account when construing the wording in *Orient-Express*, and a number of other criticisms of the decision, which understandably were not expressly referred to by the Court below but were made to it and are relevant for this Court when considering the decision.

79. The most direct answer to the case is as set out above—that on its proper construction the parties intended the hurricane to be stripped out of the 'but for' counterfactual applicable under the trends clause, because the hurricane was part of the insured peril and/or contemplated as an underlying cause of it.

80. This result is supported by examination of the interaction between the different cover clauses. In *Orient-Express* there were, as well as the property damage BI cover, (i) a non-damage prevention of access (POA) extension covering loss 'arising out of' Damage to property in the vicinity, or closure (in whole or in part) of property in the vicinity or it being deemed unusable by a competent local authority, preventing or hindering use of the premises, and (ii) a non-damage loss of attraction (LOA) extension covering loss 'resulting directly' from loss destruction or damage to property in the vicinity of the premises.[56]

81. The insurer had conceded that cover arose in relation to the POA and LOA clauses, and the Judge held that the concession was rightly made.[57] But if the insurer and Hamblen J were being logical, then there should have been cover under all of the POA and LOA clauses and the property damage clause, or none of them. Just as, on the Judge's approach, looking at the property damage clause, but for damage to the insured premises there would have been no

[55] Day4/29.7-14 {G/25/184}, 36.11-15.
[56] Paras 14-15 {E/31/924}.
[57] Para 16 {E/31/924}.

revenue as a result of the devastation around the hotel; similarly, looking at the LOA clause, even but for damage to and destruction of property in the vicinity of the premises there would have been no revenue because of the damage to the insured premises themselves, which were closed for two months for repair; and similarly, as regards the POA clause, even but for damage to or closure of premises in the vicinity preventing or hindering access to or use of the location of the hotel, it would still have earned nothing due to the damage to the premises (causing its closure for two months for repair) and the damage to the premises around.

82. This is akin to the two hunters conundrum. It is a signal that one needs to take care about applying the but for test, and to temper the counterfactual by what must have been intended. With respect, the Judge's explanation[58] was unsatisfactory:

> "Further, it is not the case that the application of the 'but for' test means that there can be no recovery under either the main Insuring Clause or the POA or LOA. If, for the purpose of resisting the claim under the main Insuring Clause, Generali asserts that the loss has not been caused by the Damage to the Hotel because it would in any event have resulted from the damage to the vicinity or its consequences, it has to accept the causal effect of that damage for the POA or LOA, as indeed it has done. It cannot have it both ways. The 'but for' test does not therefore have the consequence that there is no cause and no recoverable loss, but rather a different (albeit, on the facts, more limited) recoverable loss."

83. The application of the 'but for' test is not a matter of election by or discretion of the insurer, inevitably choosing the insuring clause that provides the lowest indemnity, but of legal entitlement and logic. If there is a discretion, why should it not be that of the insured to choose the most favourable insuring clause, by analogy with the position in relation to double insurance?[59] The very issue with concurrent independent causes is that the narrowly applied 'but for' test does allow the insurer to "*have it both ways*" as neither potential cause (the Damage to the property, and the damage to property in the vicinity) did in fact cause the loss on a 'but for' basis. Thus, the logical result would be that there could be no cover under either clause. This would, of course, be absurd, as the insurer recognised by accepting cover, and the Judge implicitly recognised by baulking at the necessary conclusion. The reason it would be absurd is that it would be contrary to common sense and the apparent intention of the parties to conclude that there was no cause of the loss, and no cover even where the two concurrent causes were both covered.[60] At trial insurers sought to rationalise the position adopted in this regard by

[58] Paras 28 {E/31/927} and 39 {E/31/929}, also 60 {E/31/932}.

[59] And note that it is conceded that where there is cover under perils in each of two policies this is akin to the two hunters situation in which a simple application of the 'but for' test to each would be inappropriate: MSAmlin Appeal Case para 105 fn 52 {B/7/246}.

[60] The illogicality probably goes further. If (as insurers contend in the instant case) the POA and LOA clauses only cover loss resulting from damage (etc) to property 'in the vicinity' of the premises and not outside the vicinity, then there was probably a third uninsured concurrent cause: as well as damage to the property, and damage to property in the vicinity, there was damage to property outside the vicinity. (It appeared to be accepted here that 'vicinity' included the entire 900 kilometre-

Hamblen J on the basis that it would have been a breach of contract for insurers to have refused to indemnify under the POA or LOA clauses[61] but this begged the question of how the 'but for' test espoused by Hamblen J could create any indemnifiable loss under those clauses in circumstances where the damage to the hotel would in any event have prevented the hotel earning any revenue.

84. This shows that the 'but for' test was, with respect, being operated in a fundamentally incorrect way. The problem necessarily follows from treating the damage to the property and underlying cause as distinct competing causes even though the property damage could not have occurred without the hurricane and the situation of the miraculously preserved hotel in a devastated region is not a position that ever could have happened and so not one the parties would ever have intended the indemnity to restore the insured to. Insurance is to protect against departures from what would otherwise have happened, not to provide an indemnity based on what could never have happened.

85. Another practical—or perhaps one should say impractical—consequence of the Hamblen J's approach of finding that, in a wide area damage situation like every hurricane would be, the insurance indemnified for the revenue that would have been suffered if the hotel had been an island of immunity in a sea of devastation, is that in some circumstances the insured would not be underindemnified but overindemnified. It would earn windfall profits where people could have accessed it and it could have profited from its hypothetical monopoly (e.g. as the only hotel able to host and feed all the construction workers of New Orleans, having tripled its pricing as being the only open hotel in the city). Critically, the logical conclusion of this is that the same windfall profit would be recoverable from insurers by every other damaged hotel on the equivalent 'but for' hypothesis.

86. Hamblen J dismissed this argument[62] but it is a substantial one that shows something has gone wrong with the construction. The parties simply cannot have intended this, and given that wide area damage (such as hurricanes, to which Louisiana is no stranger) would always have this effect, it points to an intention that the underlying hurricane event be stripped out of the counterfactual.

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squared city of New Orleans plus the surrounding area—paras 5 and 7—but it is a matter of record that the hurricanes extended further to other parts of Louisiana and some of Mississippi and Florida).

[61] Mr Kealey QC speaking on behalf of all insurers at Day4/38-41 {G/25/186}.

[62] Para 50 {E/31/930}.

87. The Court is directed to the US decision of *Prudential LMI Commercial Ins Co v Colleton Enterprises Inc*[63] (a decision of the 4th Circuit Court of Appeal in 1992,[64] considered in *Orient-Express*, where Hamblen J preferred the dissenting opinion[65]) where a motel in South Carolina was refused windfall profits following Hurricane Hugo as the insurance was not intended to provide such profits and the hurricane not occurring at all was the correct counterfactual.

88. The same result was reached in *Catlin Syndicate Ltd v Imperial Palace of Mississippi Inc* (a decision of the 5th Circuit[66] Court of Appeal in 2010)[67] where a casino in Mississippi was similarly refused windfall profits following Hurricane Katrina. Although the trends clause referred to what would have happened but for the 'loss', the Court found that the loss and the occurrence of Hurricane Katrina were "*inextricably intertwined*" so both must be stripped out of the counterfactual: cf *The Silver Cloud* in the English Court of Appeal, discussed below.

89. As to the reception of the decision, the *Orient-Express* approach has not been revisited until the present case when it was disapproved by Flaux LJ and Butcher J. It has been cited five times but only in relation to its summaries of general legal principles,[68] not its decision or outcome. It is a decision that has met with criticism. *Colinvaux* describes it as a "*curious outcome that, the greater the damage to the vicinity and thus of the risk of depopulation, the less prospect there is of any recovery by the assured*".[69] *Riley on Business Interruption Insurance* notes that "*there must be doubt over whether it is actually a satisfactory outcome for either insurers or policyholders*".[70] The text also adds that when Main Street in Cockermouth, Cumbria, flooded in 2009, insurers did not seek to argue that none of the businesses could recover much because but for the flooding of their business the rest of the street would anyway have been closed and effectively a building site for approaching six months.[71] Nor, it should be noted, was it suggested that each business should have been entitled to indemnity calculated on the windfall basis that it would be the only business open in the town.

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[63] 976 F2d 727 (4th Circuit, 1992) {G/101/1986}.
[64] Maryland, North and South Carolina, Virginia and West Virginia.
[65] Paras 21 {E/31/926} and 50 {E/31/930}.
[66] Louisiana, Mississippi, Texas.
[67] 600 F.3d 511 (5th Circuit, 2010) {G/96/2126}.
[68] In *The Kos* at para 74 as support for the *Miss Jay Jay* principle {F/26/503}; *Greenwich Millennium Village* at para 174 {F/32/689}; *Impact Funding Solutions Ltd* (first instance) [2013] EWHC 4005 (QB) at para 43 {G/59/1021}; *Cultural Foundation v Beazley Furlonge Ltd* [2018] EWHC 1083 (Comm) at para 173 as to the deficiencies of the 'but for' test {F/20/337}; *Ted Baker Plc v AXA Insurance UK Plc* [2014] EWHC 3548 (Comm) at para 160 as to the general purpose of trends clauses {G/86/1740}.
[69] Para 24-107 {G/104/2149}.
[70] Para 15.21 {E/50/1444}.
[71] Paras 15.21-22 {E/50/1444}.

90. The most ringing endorsement the insurers can find[72] is a footnote in *Arnould on Marine Insurance* which merely mentions that the but for test was discussed in *Orient-Express*,[73] and summaries of the decision by *MacGillivray* which summarise the result without criticism but also without any analysis seeking positively to endorse or defend it.[74]

Trends or other circumstances clauses

91. The policies all contain trends or circumstances clauses. These clauses arise in the context of machinery quantifying the indemnity. Such machinery typically provides a default counterfactual turnover based on the prior year, but then through trends or circumstances clauses permits adjustments to be made to allow for differences between the indemnity period and the prior year, that are attributable to events which are extraneous to the peril itself, to be built in to attempt to reach a measure of the turnover that the business would have earned but for the insured peril. See further FCA Appeal Case paragraphs 39 to 52. These clauses simply cannot be used to introduce elements of the peril, or an event contemplated by and underlying the peril, or to alter the nature of the risk assumed by the insurer outside these clauses.

92. The history of these clauses helps to show their important but limited function and scope.

Evolution of business interruption insurance

93. In a few 19th century cases it was confirmed that property cover does not extend to consequential business losses.[75] There were, however, particular valued policies that extended property cover so that on a property damage claim a percentage or other sum (by reference to the value of the stock lost, or per day of working time lost) was also payable, although there was no attempt in these policies to calculate and indemnify actual loss of profits suffered.[76]

94. In 1899 a new system of insuring anticipated profits was introduced under which the formula of loss measurement was based on a comparison of turnover or output for the period affected with the turnover or output for the corresponding period in the year preceding the damage.[77] This was called 'consequential loss' insurance or a 'profits policy', to reflect the fact that it was

[72] MSAmlin Appeal Case para 118 {B/7/252}.
[73] *Arnould on Marine Insurance* (19th ed., 2018) para 22-005 fn 32 {F/55/1136}.
[74] *MacGillivray on Insurance Law* (14th ed., 2018) para 22-001 fn1 {G/109/2196}and para 22-005 fn 27.
[75] Honour and Hickmott, *Principles and practice of Profits Insurance* (1966) p3-5 ("**Honour and Hickmott**") {E/46/1225}; *MacGillivray on Insurance Law* para 33-001 fn3 {E/44/1213}.
[76] Honour and Hickmott p6-8 {G/107/2174}.
[77] Honour and Hickmott p9 {G/107/2177}.

an extension to property cover to an additional (otherwise irrecoverable) type of loss.[78] ('*Riley on Business Interruption Insurance'* was originally titled '*Consequential Loss Insurances and Claims*' when the 1st edition was published in 1956, before changing to '*Consequential Loss and Business Interruption Insurances and Claims*' with the 5th edition in 1981 and then '*Riley on Business Interruption Insurance*' with the 7th edition in 1991.)

95. Thus in Honour and Hickmott's 1966 textbook on interruption insurance, *Principles and practice of Profits Insurance*, it was explained that there being a claim under the property policy was a condition precedent to a right to claim under the profits policy.[79] The chapter in that text on Standard and Additional Perils discusses the perils applicable to trigger cover, i.e. fire, lightning, explosion. It then adds that it had by then become possible to obtain non-damage extensions, stating (40 years before *Orient-Express*):[80]

> "For many years it has been possible to extend the cover to include protection from damage from further named perils but it will be realised that it is possible for trading loss to flow without actual damage to property (e.g. loss of revenue to an hotel following an outbreak of an epidemic). The extension of the range of perils the operation of which will cause the indemnity as set out in the specification to be payable is constantly expanding as experience and application of this class of business becomes more widespread."

96. There is then discussion of possibly relevant perils of riot and civil commotion, and earthquake, and epidemic and similar risks.[81] Honour and Hickmott note of earthquakes:[82]

> "When this peril operates it is likely that the damage will be widespread. Thus losses will flow from damage to the assured's premises but also this will be aggravated possibly by the evacuation of the surrounding district. Thus if the premises had been undamaged the business would have been affected by the incident. Does the underwriter intend to exclude the loss flowing from the damage to the surrounding area or is this covered only if the insured premises are damaged? Is it necessary for an 'area' cover to be added to give full protection?
>
> There seems to be no experience on which these points can be clarified fully but there is on record a case when storm damage was insured and the premises concerned were lightly damaged; the business however was completely stopped for a longer period than was necessary to repair the direct damage by the same storm destroying the power station of the public authority on which the works were entirely dependent. No electricity supply extension applied and it was agreed that, while there was some doubt, the extent of the loss during the repair of damage to the insured premises would be paid although it could be said that the lack of electricity supply would have caused production to cease in any event."

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[78] *MacGillivray on Insurance Law* para 33-001 and fn1 {E/44/1213}, Macken, *Insurance of Profits* (1st ed, 1927) p8 {G/110/2198}, Honour and Hickmott p3-9 {G/107/2171}.
[79] Honour and Hickmott p20 {G/107/2178}.
[80] Honour and Hickmott p95-6 {G/107/2179}.
[81] Honour and Hickmott p99-110 {G/107/2181}.
[82] Honour and Hickmott p102 {G/107/2184}.

Evolution of trends clauses

97. The first edition of A.G. Macken's *Insurance of Profits* in 1927 identifies early adjustment provisions, to adjust the revenue estimate based on the prior year,[83] which adjust for "*previous fire or to a strike, lock-out, or other exceptional circumstances having a material effect", "any exceptional circumstances which would in themselves have prejudicially effected the turnover*,"[84] or "*any variations in the business of the Insured, and equitable allowance made in the turnover for all extraordinary and other circumstances of the business*" (emphasis added).[85]

98. To explain the effect of this clause, Macken gives the following examples of "*extraordinary circumstances*": "*a strike of workpeople… epidemics, floods, machinery breakdowns, weather and market conditions, and periods of national mourning*".[86] Similarly, earlier in the text when discussing the general principles of loss of profits insurance Macken writes:[87] (emphasis added)

> "the whole basis of our scheme consists of a comparison of the abnormal with the normal. And the only abnormality with which we are concerned is that brought about by the fire. It may be that the period which we select as representative of the normal is itself abnormal from circumstances unconnected with the fire. Similarly, the depletion of turnover after the fire may have been aggravated or partially hidden by factors quite independent of the fire. Any untoward event, such as a breakdown of machinery, a flooding of works, or a strike of employees, whether it occurs before or after the fire, may have the effect of upsetting our calculations."

99. A provision closely resembling the modern trends clause can be seen in the third edition of *Insurance of Profits* in 1939. Here, as well as discussing the above "Standard policy", Macken includes a chapter on a "Modern Specification" policy which had been "*recently introduced*".[88] This wording contains a clause adjusting the Rate of Gross Profit, Annual Turnover and Standard Turnover definitions:[89] (emphasis added)

> "to which such adjustments shall be made as may be necessary to provide for the trend of the business and for variations in or special circumstances affecting the business either before or after the damage or which would have affected the business had the damage not occurred, so that the figures that adjusted shall represent as nearly as may be reasonably practicable the results which but for the damage would have been obtained during the relative period after the damage."

100. As Macken explained this wording sought to adjust any indemnity to reflect the natural growth/decline of the business: "*It takes in not only special circumstances affecting the business (such as*

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[83] Macken, *Insurance of Profits* (1st ed., 1927) ("**Macken (1st edn)**"), p37 {G/110/2201}.
[84] Macken (1st edn) p116 {G/110/2204}.
[85] Macken (1st edn) p119 {G/110/2205}.
[86] Macken (1st edn) p61-62 {G/110/2202}.
[87] Macken (1st edn) p34-35 {G/110/2199}.
[88] Macken, *Insurance of Profits* (3rd ed., 1939) ("**Macken (3rd edn)**"), p84 {G/111/2206}.
[89] Macken (3rd edn), p142 {G/111/2208}.

strikes and other spectacular occurrences) but 'the trend of the business' – its natural growth or diminution – and any variations in it, either before or after the damage".[90]

101. This same adjustment provision was referenced in the first edition of *Riley* in 1956. As to the application of this provision Riley explains:[91]

> "Quite apart from a period of general prosperity which causes such increases there are many other factors due to the influence of which the turnover of a business during a period of interruption would, but for the damage, have been relatively higher than during the corresponding period before the damage. Such an increase may be the result of one or more of a number of causes such as a trade recession or an industrial dispute at some time during the twelve months preceding the damage. Alternatively, it may be that greater turnover would have come about in the period of interruption, as the result of a special advertising campaign conducted in the previous year, the securing of some large new contract or customers, new plant, processes or lay-out of a factory, the efforts of time and motion study engineers or merely because of a general upward trend.
>
> An increase in selling prices will probably create an automatic increase in turnover; a reduction in prices sometimes has the same result. Even changes in the pattern of social habits can have a very marked effect on the sales of different commodities, whilst for some traders the vagaries of the weather can make the difference between a profit and a loss. Changes in tariff barriers or currency regulations of overseas countries can also have either harmful or beneficial effects upon many businesses."

102. By the fourth edition of Riley in 1977 the adjustment clause wording had been amended from "special circumstances" to "other circumstances":[92] (emphasis added)

> "to which such adjustments shall be made as may be necessary to provide for the trend of the business and for variations in or <u>other circumstances</u> affecting the business either before or after the damage or which would have affected the business had the damage not occurred, so that the figures that adjusted shall represent as nearly as may be reasonably practicable the results which but for the damage would have been obtained during the relative period after the damage."

In seeking to explain this addition, Riley posits that "*special circumstances*" in the earlier wording had been replaced by "*other circumstances*" because "*the prolonged period of inflation which started in the early 1970s came after a few years to be generally regarded no longer as special and yet is a very frequent cause for the use of this particular clause*".[93]

103. Riley also comments (emphasis added):[94]

> "It is important to bear in mind that the indemnity in respect of reduction in turnover is qualified by the words 'in consequence of the damage.' If, therefore, the reduction is attributable wholly or in part <u>to causes not connected with the damage which would have affected turnover</u>

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[90] Macken (3rd edn), p86 {G/111/2207}.
[91] Riley, *Consequential Loss Insurances and Claims* (1st ed, 1956), para 50 {G/112/2209}. See also the examples of factors taken into account by the clause at paragraph 52: *"increased competition… a general trade recession, unseasonable weather conditions, or a strike or lock-out either in the particular trade concerned or in transport or other industries"* {G/112/2211}.
[92] Riley, *Consequential Loss Insurances and Claims* (4th ed, 1977), para 52 {G/113/2213}.
[93] See also Hickmott, *Interruption Insurance, Proximate Loss Issues* (1990), p30: "*Originally the word 'special' was used instead of 'other'. This resulted in an unintended restriction in that features particular to a business might not be 'special' if they always existed, but were of a nature which would call for an adjustment to be made in equity*" {G/106/2167}.
[94] Para 36 {G/113/2212}.

> irrespective of the damage having taken place, an adjustment must be made to the figure of standard turnover in order to reflect as accurately as possible the loss solely due to the damage. For this purpose the other circumstances clause … is employed.
>
> For example, during the time when the turnover of a business is partially reduced as a result of damage, if turnover is further reduced because supplies of raw materials are held up owing to a strike in another industry, the loss due to the latter cause would not be the responsibility of the insureds. Such loss would have been experienced had there been no damage. Similarly, if the insured's business were at a standstill because of damage and an extraneous circumstances, such as a strike in their own industry took place which would in any event have meant a reduction in turnover, an appropriate adjustment must be made to the figures from which the shortage in turnover is calculated. Otherwise the insured would be compensated for loss outside the scope of the policy, the expressed intention of which is an indemnity for loss due to reduction in turnover 'in consequence of damage'."

104. Accordingly, the trends or circumstances clauses serve a specific purpose of adjusting for matters extraneous to the peril, having evolved in the property damage context where the possibility of adjusting for an element of a composite peril would almost never arise. Although this is very much a self-contained and esoteric area, if an analogy with the common law is at all helpful it is to be found in the distinction in the approach to causation to be found in *Baker v Willoughby*[95] and *Jobling v Associated Dairies*[96] when dealing with subsequent events which result in a more serious injury or condition than that caused by the original tortfeasor. In the former case the original tortfeasor was not relieved of liability for the effect of the injuries he caused to the victim's leg by the effect of the more serious injuries caused by a subsequent tortfeasor which resulted in the amputation of the leg, whereas in the latter the original tortfeasor was relieved of liability for injury to the claimant's back by the effect of the more serious condition that the claimant subsequently developed attributable to the ordinary vicissitudes of life.

The clauses in the present case

105. The general quantification provisions in this case are discussed in the FCA's Appeal Case. In short, most of them use a default counterfactual standard turnover from the equivalent period to the indemnity period but a year earlier, and a rate of gross profit during the previous financial year.

106. The adjustment clauses vary slightly but refer to "*the trend*"/"*trends*" of the business, "*circumstances*"/ "*other circumstances*" / "*special circumstances*", and often also "*variations*" in the business. They refer to a target of, "*as nearly as [may be] [reasonably] practicable*" or "*as near as possible*", arriving at results which (save for RSA4) "*but for the [damage]*" would have been achieved.

[95] [1970] AC 467 {G/45/351}.
[96] [1982] AC 794 {G/62/1079}.

107. The majority of these clauses are drafted by reference to 'damage' and have to be 'manipulated' through construction to apply to non-damage extensions.[97] This reveals, as is not disputed, the history of these clauses as focused around consequential loss in property cover. As Hiscox put it, "*the trends clause derived from an old form before the BI section included non-damage covers*".[98]

108. As noted in the FCA's Appeal Case, the property damage history is important because in the vast majority of property damage cases (fire, floods etc) the peril emerges suddenly and cannot and will not affect a business before causing the damage.[99] The perils in question in this case are of a very different type. First, they are composite perils. Secondly, they do not cause damage to the insured's property, and therefore provide a free-standing BI cover unlike the BI cover consequent on property damage for which BI policies were originally developed. Thirdly, they have an element that the insuring clause itself contemplates will emerge prior to the other elements.

109. Insurers here are therefore seeking to apply the trends clauses to a very different type of peril in a way which goes beyond their original and underlying commercial purpose, namely to address matters extraneous to the insured peril (e.g. the fire or flood which damaged the premises). In addition to such manipulation as is necessary to apply a trends clause to these insuring clauses at all, insurers also need the Court to construe any reference to a trend or other circumstance or suchlike so as to adjust the indemnity so as to reflect the effect of *an element of the insured peril itself*, in particular the element that the insuring clause contemplates will emerge before the other elements. This is a step too far in the construction exercise, going beyond what the purpose and scope of operation of the trends clause would have been when applied to a simple property damage case and beyond such manipulation as was necessary simply to cause the trends clause to apply to the insuring clause.

Discussion

110. The trends clauses appear within the quantum machinery. They go to valuation of the claim. The trends adjustments look at the performance and capacity of the business.[100] The terms 'trends' and 'circumstances' need to be read in the context in which they are being used, i.e. in a trends clause, and having regard to the commercial purpose of such a clause. The purpose of such clauses, and the 'but for' test within them, is to avoid the provision of indemnity for what

[97] Judgment [120, 167-8, 198, 240, 275, 297, 346, 380, 387].
[98] Hiscox Trial Skel para 401 {D/21/1617}.
[99] Some wider natural disasters, such as hurricanes and wildfires, form an exception to this, as their likely impact is known in advance.
[100] See e.g. *Riley on Business Interruption Insurance* (10th ed., 2016) para 14.3 at pp. 367-370 {E/50/1404}.

would have happened to the business anyway by virtue of the vicissitudes of (commercial) life (by analogy with *Jobling*); not to rerun a causation test by bringing in via the back-door a remodelling exercise that excludes the underlying cause which is an express element of the peril itself.

111. As Macken writes, they are triggered by matters "*unconnected with*" or "*quite independent of*" the peril. As Riley writes, they look to "*extraneous*" circumstances.

112. Once one identifies that as being the purpose of such clauses, it is logical to exclude from the ordinary vicissitudes of commercial life the extraneous impact that the event or phenomenon which has resulted in cover under the policy being triggered either has had prior to the policy being triggered, or would have had if it had continued to operate without the other elements of the insuring clause being triggered. Thus, in a traditional damage case, the impact of the triggering hurricane, storm or wildfire on property in addition to that of the insured is not an ordinary vicissitude of commercial life or extraneous to the peril. It is the natural and probable (if not inevitable) result of the peril which has resulted in there being damage to the insured's property. The parties to the policy cannot have intended that the 'but for' test for the adjustment under a trends clause of the default figure for loss of turnover or profit should proceed on the hypothetical premise that the peril which in fact caused damage to the insured property somehow miraculously left the property undamaged whilst devastating the surrounding area. Rather it is contemplating something extraneous to that which caused the damage to the property.

113. This is reflected in Honour and Hickmott's experience of loss adjustment of losses arising from a storm that took down the electricity supply as well as damaging the insured's property (see above paragraph 96) and Roberts' (author of Riley's) experience of Cockermouth (see above paragraph 89). Further, Hickmott in his technical text '*Interruption Insurance: Proximate Loss Issues*' (which of course pre-dates *Orient-Express* but which does not seem to have been brought to the Court's attention) is explicit that wide area damage is removed from any counterfactual under the "*U.K. market intention of the cover given and what it is considered would be adopted by the Courts if it was ever submitted to them*", giving the example of a storm damaging both a hotel and an access bridge not owned by the hotel, i.e. where there is "*widespread area damage from the same insured peril*" (i.e. the storm).[101]

[101] Hickmott, *Interruption Insurance: Proximate Loss Issues* (1990) pp26-8 {G/106/2165}, 31-2 and 49-51.

114. The same applies with a non-damage disease peril like an epidemic. The entire outbreak/emergency must be taken out for the counterfactual exercise dictated by the quantum machinery or, more to the point, given the structure of the quantum machinery, there is no basis positively to adjust or alter (using the trends clause) the standard revenue taken from the prior (pre-epidemic) year and used as the default counterfactual revenue in order to insert what the effects of the epidemic would have been but for, for example, the business being forced to close. The trends or other circumstances clause is simply not engaged by the underlying trigger event itself.

Two examples

115. The FCA asked the Court below to consider the example of the 2005 explosion of the Buncefield oil storage depot and property damage-triggered BI cover of a warehouse some 800 meters from the blast which had been damaged by the explosion,[102] with explosion an insured peril under the property cover. The FCA says that the intention must be that the entire wide area damage is removed from any counterfactual when calculating the BI indemnity. The insurers would remove only the damage to the warehouse but leave the explosion and its effects elsewhere. Thus, the more devastating the explosion, the less recovery possible as the greater the effects of the explosion beyond the warehouse that have to be assumed still to have occurred when calculating the indemnity. Insurers say that the BI peril does not intend to go beyond 'damage' and appear to be saying that this is the case regardless of the standard requirement for BI indemnity that the damage be covered under the material damage section (i.e. requiring the damage to have been caused by an insured peril – a non-excluded peril in an all risks policy). Thus, at trial RSA submitted that under RSA2, which gave cover for damage caused by specified perils including explosion and BI cover for damage for which RSA had admitted liability under the material damage section (which it would do only if the damage was caused by one of the specified perils), all of the effects of the explosion other than the damage to the premises were to be taken into account in a counterfactual.[103] But this introduces uncommercial and very substantial limits on the BI cover for damage caused by explosion or other perils capable of causing wide area damage such as (taking examples from the specified perils in RSA2) fire, earthquake, impact by aircraft, storm, tempest, flood, riot, civil commotion not warranted by the wording or the parties' apparent reasonable intentions. The more devastating the explosion or other peril, the less you can recover, the more widespread the pollution or toxic spill, the less protection you have.

[102] Day1/152 {G/22/173}.
[103] Day4/181 {G/25/194}.

116. At trial, Butcher J posited a second example, where a railway is insured against delays (BI) due to landslip. There is a storm which causes landslip, and because of the landslip the trains do not run. However, unbeknownst to anyone at the time, a problem to the signalling had also been caused by the same storm which meant that the train would have been delayed in any case.[104] The first point is that the landslip was a proximate cause of the interruption and loss. There is no but for requirement here. The signalling may have been a concurrent uninsured but unexcluded effective proximate cause, or the signalling may have been a lesser and so not effective cause, or on the proper construction the shared underlying cause of both means that the signalling is not a rival possible proximate cause at all. But on any view, the law will hold that the insured peril of landslip is a proximate cause.[105] As Butcher J put it "*It has caused it in a real sense. It has been an absolutely pivotal part of the reason why the train didn't run.*"[106]

117. It is true that at the indemnity (i.e. quantification) stage, a but for test may come in, and that may require one to ask whether the signalling was a trend or other circumstance. One would also have to construe the policy to decide whether the signalling is sufficiently interlinked with the landslip to be able to be set up as a rival but for cause. If the policy had expressly covered "*delay due to landslip due to storm*" (i.e. specified the underlying cause as part of the composite peril as in the present case) it is difficult to see how the signalling also damaged by the storm could rationally be set up as a rival cause.[107] But one can go further and say that a cause of landslip that the parties would most obviously have in mind would be heavy rainfall in a storm and it would undermine the commercial purpose of the cover to in effect exclude BI indemnity simply because the storm had other physical effect which created uninsured concurrent causes of the loss. (In that context, one must also consider that if landslip and signal failure had both been insured, nevertheless neither would satisfy the but for test as insurers seek to apply it because of the other, notwithstanding that they are not independent events but are both caused by the same underlying cause.) A broken engine (QBE's example) or signal failure unrelated to the storm (an FCA example[108]) probably would be an 'other circumstance' that would reduce the indemnity, because it had nothing to do with the storm or landslip, unlike the signalling failure.[109]

[104] Day4/42-43 {G/25/187}.
[105] Day8/61 {G/29/213}.
[106] Day4/43:13-15 {G/25/187}.
[107] Day8/61:25-62:24 {G/29/213}.
[108] Day8/74:16-24 {G/29/214}.
[109] Day7/106:22-107:6 {G/28/208}.

118. The insurers' position, that the landslip is not a proximate cause, and that any indemnity based on the prior year's earnings must be adjusted for the 'other circumstance' of the signal failure,[110] should be rejected.

The Pre-Trigger Peril Point

119. The insurers understandably rely on the Court's findings that if an element of the composite insured peril existed prior to the full combination triggering cover, the trends clause may alter the counterfactual to strip out that part of the composite peril (i.e. the Pre-Trigger Peril Point), and say this is inconsistent with the Court's general (and correct) conclusion that all the elements including the underlying COVID-19 must be stripped out of the counterfactual.[111] This is a point that is especially relevant to prevention of access/hybrid policies.

120. There is indeed an inconsistency between the Court's findings as to the core counterfactual point (addressed above) and the Pre-Trigger Peril Point (addressed in the FCA's Appeal Case). The insurers naturally seek to use the mistaken tail of the Pre-Trigger Peril Point to wag the dog of the counterfactual point. The FCA's arguments as to why the Court below was wrong about the Pre-Trigger Peril are set out in detail in the FCA's Appeal Case. But the Court's approach to the Pre-Trigger Peril does not provide any support to insurers' case on the counterfactual.

121. It is, however, necessary here to deal with MSAmlin's appeal in relation to the imposition of a cap on the reduction in revenue due to the Pre-Trigger Peril Point in Declaration 11.4. MSAmlin says, in just one paragraph in its Appeal Case, that there should be no cap and a measurable pre-trigger downturn due to COVID-19 should be stripped out of the counterfactual if it would have continued, including at a higher level than pre-trigger if it would have increased.[112]

122. It appears that this argument is only advanced on the basis that it seeks a consequential variation of the declaration if it is successful in its appeal on the counterfactual point itself. If the Court's findings on the counterfactual were overturned in their entirety, then all effects of a disease outside the relevant policy area/outside the imposition of particular restrictions can be included in a counterfactual, in which case clearly the pre-trigger effect of those causes will not necessarily be its maximum effect. (It must be remembered that the Court below was not deciding if the matters were trends or other circumstances, only that, if they were such trends or other circumstances, they could be taken into account.).

[110] Day4/43:7-49:9 {G/25/187} (MSAmlin); Day7/106:15-107:6 {G/28/208} (QBE).
[111] Arch Appeal Case para 52-4 {B/4/114}, Arch Ground 3 paras 10-11 {A/4/85}, Hiscox Appeal Case paras 87-91 {B/6/178}, MSAmlin Appeal Case paras 122-4 {B/7/253}.
[112] MSAmlin Appeal Case para 123 {B/7/253}.

123. If MSAmlin seeks to advance an appeal in relation to the cap other than parasitically on its counterfactual case (with a different reasoning and different desired outcome), it is unsatisfactory that it does not include its submissions in its Appeal Case, instead stating that they will be addressed in insurers' Respondents' Cases, preventing the FCA from having any opportunity to respond in writing to the Appeal. If MS Amlin is intending to pursue some free-standing point in this regard then, subject to the FCA's appeal on the Pre-Trigger Peril point to the effect that it is wrong to treat the pre-trigger COVID-19-related downturn as relevant for quantification of an insured's loss at all (whether capped or not), the FCA will contend that if pre-trigger downturn is to be taken into account, it cannot be at more than the pre-trigger level of downturn, and the cap must stand, given that post-trigger any effect or further effect of the pandemic on the business is, on the Court's finding, excluded from any trends clause counterfactual.

B. DISEASE CLAUSES

Introduction

124. The disease clauses which insurers are appealing are Argenta, MSAmlin1, MSAmlin2, QBE1 and RSA3. Further, the RSA1 hybrid clause principally raises disease clause issues and is accordingly considered in this section, as are elements of Hiscox4 (which contains a 1-mile disease clause). Also in issue are QBE2 and QBE3, which the FCA is appealing and which are addressed in the FCA's Appeal Case. Whilst each of the disease clauses needs to be considered separately, there are common themes which can be considered together for convenience. Their key components are as follows:

	Loss	*Interruption / interference*	*Disease*
Argenta	indemnity for	interruption	as a result of any occurrence of a notifiable human disease within a 25-mile radius
MSAmlin1	loss	as a result of interruption or interference	following any notifiable disease within a 25-mile radius
MSAmlin2	loss	resulting from interruption or interference[113]	following any notifiable disease within a 25-mile radius
QBE1	loss	resulting from interruption or interference	arising from any human infectious or human contagious disease manifested within a 25-mile radius
QBE2	loss	resulting from interruption or interference	in consequence of any occurrence of a notifiable disease within a 25-mile radius

[113] The clause provides cover for "**consequential loss** following" disease, and definition of consequential loss is "Loss resulting from interruption of or interference with the business following" damage.

QBE3	loss	resulting from interruption or interference	in consequence of an occurrence of a notifiable disease within a 1-mile radius
RSA3	loss	resulting from interruption or interference	following any occurrence of a notifiable disease within a 25-mile radius
Hiscox4 (hybrid)	loss	resulting solely and directly from an interruption caused by inability to use due to restrictions imposed	following an occurrence of a notifiable human disease within 1-mile of the business premises
RSA1 (hybrid)	loss	as a result of closure or restrictions placed on the Premises	as a result of a notifiable human disease manifesting itself at the Premises or within a radius of 25 miles of the premises

125. In order to establish cover under these clauses, an insured therefore needs to show:

125.1. A notifiable disease;

125.2. Which has "*occurred*", "*manifested*" or similar;

125.3. Within a 1-mile or 25-mile radius of the premises;

125.4. Which causes interruption or interference (save for MSAmlin2 which skips this step); and

125.5. Which causes loss.

RSA1, being a hybrid clause, also includes public authority elements, which are touched upon at paragraphs 423ff below but to which a causation appeal does not relate. Hiscox4, as a hybrid clause, does raise substantial disputes in relation to the composite peril which are discussed below at paragraphs 426ff.

126. The third and fourth components give rise to the main issues which this Court needs to decide.

127. The first, and most important, issue is whether the Court was right that "*on the construction of those wordings, they insure the effects of COVID-19 both within the particular radius and outside it*" (Judgment [532]). In other words, does the phrase "any occurrence of a notifiable disease within a 25-mile radius" (or similar) mean that there is cover for the effects on the insured's business of a notifiable disease after it has satisfied the requirement to be present within 25 miles, or only for the effects of the part of the notifiable disease which is within the 25-mile radius?

128. This arises in two ways on the insurers' case. First, they say that because of the concurrent effect of the disease outside the 25-mile radius, insureds will not be able to prove that the disease within the 25 mile radius was a 'but for' cause of any loss or interruption of or interference with the insured's business. Secondly, they say that if that is not right, nonetheless the effect of the disease outside the 25-mile radius is part of the 'but for' counterfactual under the trends clause. These arguments have the result that no such policy in the country will pay for the effects on businesses of the national pandemic or the actions taken by the Government from 16 March 2020 in response to the national pandemic, because in relation to each policy (or each insured location under each policy if more than one location is insured), the insurer will be entitled to rely on what was happening elsewhere in the country as an overriding cause. Thus, an insurer can tell a policyholder in area A that he/she has no cover because of the concurrent causative effects of the outbreaks in areas B, C , D etc and a policyholder in area B that he/she has no cover because of the concurrent causative effects of the outbreaks in areas A, C , D etc and so on. Equally, insurers would also appear to be suggesting that a policyholder with (say) 50 insured premises spread right across the country has no cover, for similar reasons.

129. This is the central question for disease clauses. The initial stage is a construction exercise and if the Supreme Court upholds the conclusion of the Court below (as it should), then no issues arise as to the causal link between the interruption and the disease. If there is cover for COVID-19 both within the particular radius and outside it, then insurers' causation arguments fall away: interruption or interference with which this case is concerned, including all interruption or interference under the national COVID-19 measures, was caused by COVID-19 within the meaning of the relevant policy terms. And as the Court observed, Judgment [110]:

> "If, properly construed, there is cover for the effects of a disease which may occur both within and outside the specified radius, and which may trigger a response of the authorities and the public to the outbreak as a whole, then it would be inconsistent with the nature of the cover to regard the occurrence of the disease outside the radius, or the response of the authorities or the public to that occurrence of the disease, as being alternative, uncovered, causes of the business interruption which could be relied on as supporting an argument that there would have been the same business interruption in the absence of the insured peril."

130. In other words, if as a matter of construction the disease is indivisible, then "*[t]he proximate cause of the business interruption is the notifiable disease of which the individual outbreaks form indivisible parts, in other words the disease in the UK is one indivisible cause"* (Judgment [532, also 111]).

131. The indivisibility here is a conclusion based on the construction of the policy, but it is supported by the practical impossibility of division: the parties cannot have intended that disease inside the area and disease outside the area could count as competing causes because they must have realised that they could never in fact be separated.

132. It is only if the Supreme Court rejects the Court below's decision on that first central construction issue that more complex causation questions arise. Only if this Court decides that cover is just being provided for the impact of the part of the disease outbreak which is within the radius (and not for the same disease outbreak to the extent it is outside the radius), does it need to consider what causal link needs to be established between the relevant circular part of the outbreak within the radius, and the interruption or interference, by the words "*following*", "*as a result of*", "*arising from*" or "*in consequence of*" in this context, and whether that causal link is satisfied on the facts of this case.

133. As to that, the High Court correctly decided that all cases of COVID-19, whether inside or outside the radius, were equally effective causes of the imposition of national measures: Judgment [112, 165 and 534] and Declaration 10. As the Court reached a conclusion favourable to the FCA as a matter of construction, the Court did not consider it to be necessary to decide whether, if its conclusion on construction was wrong, the same result could be achieved through a causation analysis: Judgment [534-535]. However, the FCA seeks to uphold the declarations made on the additional ground that the Court's conclusions at Judgment [112] and [534] and the Court's Declaration 10 mean that even if cover under any of the policies was only for the effects of the part of the notifiable disease which is within the policy radius, that part of the disease outbreak was a proximate cause of the national action and public reaction. This means that because COVID-19 outside the radius was an uninsured but not an excluded cause, there is cover (termed the ***Concurrent Cause*** route below). This argument requires a more thorough consideration of the principles of causation, and which are dealt with in this section at paragraphs 318ff below.

Facts about notifiable diseases that are relevant to construction

134. Each of the clauses requires proof of a notifiable disease, and it is common ground that COVID-19 satisfied that definition on 5 March 2020 in England and 6 March 2020 in Wales.[114] It is, however, relevant to construction to understand what a 'notifiable disease' is, and to note that these are not clauses that cover diseases including notifiable diseases, but they are specialist clauses only covering notifiable diseases.

135. This point is of central importance to construction of the disease clauses, and includes the following four points of factual matrix all of which were found by the Court to be within the reasonable contemplation of the parties and should not be controversial:

[114] Agreed Facts 1 {C/43/1872}.

135.1. First, notifiable disease clauses respond to a series of existing contagious and dangerous diseases, which have the potential to spread widely, quickly and unpredictably, including by epidemics or pandemics.

135.2. Secondly, the clauses also respond to new diseases which only become notifiable diseases during the lifetime of the policy.

135.3. Thirdly, the diseases also have the potential to lead to severe authority action taken at national level.

135.4. Fourthly, the resultant public authority action may well respond to the entire outbreak, not individual parts or cases, in which case it may well be impossible to distinguish whether that reaction was to the disease within or outside the relevant area because, in reality, it will be to the outbreak as a whole.

136. A fifth, and slightly separate point, is that many (although not all) of the disease clauses respond to cases which are asymptomatic and undiagnosed.

137. These five points are now developed.

Matrix point 1: Notifiable diseases are contagious, dangerous and can spread widely, including by epidemics

Public Health (Control of Disease) Act 1984

138. The 21 and 26 March Regulations and the Regulations that govern notifiability of diseases were made under the Public Health (Control of Disease) Act 1984 (the ***1984 Act***).[115] By section 13(1)(a) of that Act, as originally enacted, the Secretary of State has the power to make regulations as respects the whole or any part of England and Wales "*with a view to the treatment of persons affected with any epidemic, endemic or infectious disease and for preventing the spread of such diseases*" (emphasis added). The Health and Social Care Act 2008 introduced into the 1984 Act a new and long Part 2A titled "*Public Health Protection*" containing new sections 45A to 45T.[116] These gave powers to the appropriate Minister in England and in Wales, and to justices of the peace, regarding infectious and contagious diseases.

[115] {E/7/96}.
[116] {E/7/96}. Further detail on the background to the 2008 Act is set out in in Agreed Facts 5 {D/9/1529}.

139. By section 45B, the Minister was given regulation-making powers in relation to international travel, including powers to prohibit or regulate the arrival or departure of aircraft, trains and other conveyances, for "*preventing danger to public health*" and "*preventing the spread of infection or contamination*".[117] By section 45C, the Minister was given domestic regulation-making powers, to make regulations which "*make provision for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in England and Wales (whether from risks originating there or elsewhere)*".[118] By section 45A(3), any reference to "*infection or contamination*" was a reference to "*infection or contamination which presents or could present significant harm to human health*".[119] The domestic and international travel regulation-making powers conferred by sections 45B and 45C are therefore, and necessarily, extremely broad, but are limited by the fact that they are to be taken in response to matters which present or could present significant harm.

140. Section 45C(3) of the 1984 Act states that the domestic regulations may in particular include provision for (i) imposing duties on doctors and other people to record and notify cases or suspected cases of infection or contamination – section 45C(3)(a); and (ii) imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health – section 45C(3)(c).[120] These twin powers necessarily envisage each other and therefore may apply in parallel: the presence of diseases notifiable under section 45C(3)(a) may lead to restrictions or requirements made under section 45C(3)(c). They are addressed in more detail below.

The 31 notifiable diseases at the date of inception of the policies, which include diseases with epidemic potential

141. Section 10 of the 1984 Act, as originally enacted, listed the notorious diseases of cholera, plague, relapsing fever, smallpox and typhus as notifiable diseases. [121] Schedule 1 to the Public Health (Infectious Diseases) Regulations 1988 added a number of other diseases to that list, including AIDS, anthrax, measles and mumps and yellow fever. [122] In England the Secretary of State used the power in section 45C(3)(a) of the 1984 Act to make the Health Protection (Notification) Regulations 2010,[123] with equivalent Regulations being made in Wales.[124] These Regulations list diseases in Schedule 1 and their causative agents in Schedule 2, and require doctors and

[117] {E/7/97}.
[118] {E/7/97}.
[119] {E/7/96}.
[120] Further detail on these powers are set out in Agreed Facts 5 {D/9/1529}.
[121] {G/132/2379}.
[122] {G/37/299}.
[123] {E/5/81}.
[124] The Health Protection (Notification) (Wales) Regulations 2010 {G/41/313}.

diagnostic laboratories to notify their local authority of (i) any suspected cases of those diseases, or human samples containing their causative agents, and (ii) any other infections which present or could present a significant harm to human health. Importantly, once the local authority has received a notification, it must disclose that notification to each of (a) Public Health England, (b) the local authority in which the person diagnosed with the disease resides, and (c) if appropriate, the local authority in which the person entered the country. This requirement facilitates and demonstrates the potential need for widespread responses, i.e. ones which are not purely local (Judgment [104]).

142. As enacted, the list in these Regulations contained 31 diseases, including those referred to above and SARS. These are the only 31 diseases (out of the many diseases) that are considered by the authorities to present a sufficient danger to public health to require early and mandatory identification, and all of which do not just occur but have 'outbreaks'.[125] As the Court found, this list includes diseases which are (i) capable of spreading in unpredictable and complicated ways, and (ii) which (therefore) could lead to a national response.

143. More particularly, as to (i), the Court found that the list includes:

143.1. Diseases which are "*capable of widespread dissemination… they may spread in highly complicated, often difficult to predict, and what might be described as 'fluid' patterns*" (Judgment [104]);

143.2. Diseases "*such as SARS, which might undoubtedly give rise to an epidemic*" (Judgment [116]), and

143.3. which "*spread to various countries in 2002-2003, and which in certain places led to stringent control measures."*

144. The Court therefore concluded that: *"The policy thus specifically envisaged that there would be cover for business interruption as a result of SARS, a disease capable of causing an epidemic or pandemic*" (Judgment [132]).

145. Significantly for the current case, and as the Court again found, "*The nature of some of those diseases is that they may very well spread over a significant, and difficult to predict, area"* (Judgment [143], giving SARS as an example), and "*spread over large areas, as infected people move around*" (Judgment [160]). When such a disease occurs, it can only appropriately be described as an outbreak (and indeed

[125] All of the disease wordings other than QBE3 expressly refer to 'outbreaks' when defining notifiability by reference to such diseases "an outbreak of which" it has been stipulated must be notified to the relevant authorities.

all the wordings save for QBE3 expressly refer to the test for notifiability as whether an "outbreak" needs to be notified).

146. Insurers cannot disagree with this: MSAmlin accepts that the parties contemplate local disease "*and widespread epidemic disease*".[126]

147. As to (ii) and national responses, this is addressed further under Point 3 below.

Matrix point 2: Insurers have chosen to insure these diseases and any future notifiable diseases

148. On 5 March 2020 and through the regulation-making power under section 45C(3)(a) of the 1984 Act, the Secretary of State in England added COVID-19 to that list (and SARS-CoV-2 to the causative agents list), making it mandatory for any doctors or laboratories to report suspected cases to their local authorities, and the local authorities to report upwards to Public Health England and laterally to any other affected local authority.[127] Wales followed a day later.[128] At that point, it became a covered disease under these policies.

149. Insurers can choose which diseases (if any) they wish to provide cover for. Some may provide a 'closed list' of diseases, which mirrors (wholly or nearly) the notifiable diseases in the relevant legislation. For example, the Arch policy before the Court provides cover for a closed list of 28 diseases, which does not include COVID-19[129] (the Arch dispute therefore relating to the prevention of access clause).

150. By contrast, all the disease clauses which the Court is being asked to rule on do not itemise a list of covered diseases. Nor have insurers ever argued that COVID-19 is not covered because it became a new notifiable disease during the life of the policies. As noted by the Court (e.g. Judgment [103, 116, 132]), unlike the Arch disease clause, these policies all provide cover for any disease which becomes a notifiable disease during the lifetime of the policy. This necessarily includes diseases which did not yet exist, or which had not yet manifested themselves, at the time the policy was incepted, but which were considered sufficiently important to be added to the list of notifiable diseases during the lifetime (often 1-year) of the policy (likely due to a public health threat). The most recent addition prior to inception of the policies was SARS. The cover within these policies is therefore expressly and deliberately provided for as-yet unknown diseases which, as the Court found, "*might well be highly contagious with the potential to cause an epidemic*

[126] MSAmlin Appeal Case at para 38 {B/7/219}.
[127] Regulation 2(2) of the Health Protection (Notification) (Amendment) Regulations 2020 {G/41/327}.
[128] The Health Protection (Notification) (Wales) (Amendment) Regulations 2020 {G/43/328}.
[129] See the definition of Notifiable Human Infectious or Contagious Disease at page 32 {C/4/224}, and the disease clause on page 34.

or pandemic: a highly contagious, fast-spreading, serious disease is exactly the sort of disease which would be expected to be made notifiable" (Judgment [132]).

151. Little therefore needs to be said about the risk of future epidemics, pandemics and consequential governmental action which existed when these policies were incepted. As set out in Agreed Facts 7,[130] the world has seen a number of recent epidemics and pandemics, including SARS in 2002 and 2003, swine flu in 2009, MERS in 2012, Ebola in 2014-16 and Zika virus in 2016. As recently as 2017, the UK Government – in the light of the risk of further influenza outbreaks – published the National Risk Register of Civil Emergencies, the stated purpose of which was to inform the public about events which could cause widespread damage and would require a governmental response, and to provide advice and guidance on how the public could prepare. The Register indicated the risk of an influenza pandemic, and explained that the consequences could include up to 50% of the UK population experiencing symptoms, between 20,000 and 750,000 fatalities and high levels of absence from work. It also described the risk of other "*emerging infectious diseases*" with several thousand people experiencing symptoms, and up to 100 fatalities. In a risk matrix illustrating the relative effects and likelihood of different risks, pandemic influenza was given a likelihood of 4/5 of occurring in the next five years, with an impact severity of 5/5, the highest of all natural hazards, accidents, diseases and societal risks. That prediction has sadly proven accurate, albeit that the virus causing COVID-19 whilst causing some of the symptoms associated with flu is not a flu virus but is in fact a new strain of coronavirus (coronavirus being a type of virus which causes illnesses ranging from the common cold to MERS and SARS).

152. These insurers (unlike other insurers) chose to provide cover for novel diseases. These diseases might spread like SARS, or like other listed diseases, or in a way which none of them had done before. As the Court found (and as has not been challenged) there was of course a real risk that such a novel diseases or indeed an existing notifiable disease (like SARS) for which there is no vaccine (Judgment [104]) could become pandemics or epidemics. And they could well be the types of diseases in which the Secretary of State would exercise his or her powers to make restrictions under section 45C(3)(c) of the 1984 Act, considered next.

[130] {D/11/1538}.

Matrix point 3: Contemplated public authority action

153. The contemplated public authority action in response to notifiable diseases demonstrates three important features: it is potentially severe; it is potentially national; and there is no reason that it will be limited to the area in which the outbreak is occurring.

154. Dealing first with severity: under section 45C(3)(c) of the 1984 Act, the Secretary of State has the power to make regulations "*imposing or enabling the imposition of restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health*". Section 45C(4) provides that these restrictions or requirements could include in particular (a) requirements to keep a child away from school, (b) prohibitions on events or gatherings, (e) rules relating to dead bodies and human remains, and (d) importantly, "*a special restriction or requirement*", defined as those things which could be imposed by a justice of the peace by sections 45G(2), 45H(2) or 45I(2). These "*special restrictions or requirements*" are very severe powers indeed, albeit ones which we are now all familiar with. They include the power to order that a person ("P") be kept in isolation or quarantine (section 45G(2)(d)); be subject to restrictions on where P goes or with whom they have contact (section 45G(2)(j)); and that P abstain from working or trading (section 45G(2)(k)). They also include the power to order that premises be closed (section 45I(2)(a)) or even destroyed (section 45I(2)(d)).

155. The severity of these restrictions means they cannot be made without being approved by a resolution of the Houses of Parliament (or National Assembly for Wales), unless the "*emergency procedure*" in section 45R is adopted, in which case the Regulations expire after 28 days without an affirmative resolution: see sections 45Q and 45R of the 1984 Act.

156. The 21 March and 26 March Regulations were not made under new primary legislation (such as the Coronavirus Act 2020), but were made under the existing statutory powers in section 45C(3)(c) and (4)(d) of the 1984 Act, using the emergency procedure provided by section 45R. The emergence of COVID-19 and the Government action taken in response to it is unprecedented, in that the national measures enacted in response to COVID-19 have never been done or known before in the UK. But the diseases which the 1984 Act contemplates are ones which present a sufficient and significant harm to human health, and which are sufficiently contagious or infectious, that they may necessitate severe restrictions on liberty and extreme powers in relation to the closure and destruction of property – powers which the 1984 Act expressly contemplates and, therefore, provides.

157. As for the second point that the action is likely to be national action: it is self-evident from the Regulation-making powers in the 1984 Act that public authority response to public health threats could be taken on a national level. The Court below thus rightly recorded that "*It is obvious that one such way for business interruption or interference to arise is as a result of the response of governmental or local authorities*": Judgment [228]. It also found at Judgment [104] that:

> "the list of diseases includes some which might attract a response from authorities which are not merely local authorities, and which is not a purely local response. The requirement under the Regulations of notifications to PHE, and to other local authorities facilitates such wider responses… the parties must have contemplated that there might be relevant actions of public authorities which affect a wide area."

158. MSAmlin's and Ecclesiastical's trial skeleton positively averred this point at trial, saying that these provisions of the 1984 Act "*contemplates central government action having local effect in all or any localities everywhere*", and that "*Central government has always had the overarching power to take action to prevent, protect against, control or provide a public health response to the incidence or spread of infection or contamination in England and Wales. That power includes powers to make general provisions, contingent provisions, or specific provisions in response to particular sets of circumstances, both nationally and also locally*".[131] The Court below similarly recorded Mr Kealey QC's oral submissions to the effect that a number of notifiable diseases "*would have the capacity to spread more widely, like the plague and in that context, central government would be expected to intervene*".[132]

159. It is thus wrong, as Hiscox argues, that the parties "*would never have dreamed*" that businesses could be rendered inaccessible "*by reason of the entire public being mandatorily subjected to a modified form of house arrest*".[133] Argenta is equally wrong to claim that "*the parties cannot be taken to have anticipated, when the policies were concluded, that such measures were likely to be adopted*".[134] The 21 March and 26 March Regulations are unprecedented, but they did not appear out of nowhere: they were made under existing powers, which had been in existence for a decade, which gave the government the power to act nationally in response to diseases posing a significant danger to human health.

160. QBE is the only insurer who takes a more realistic position on this point, conceding that the "*most likely*" cause of BI loss caused by a notifiable disease is "*civil, government and/or military action*"[135] a recognition, of course, that if the government or military is taking action, then there

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[131] MSAmlin Trial Skeleton para 67.3(f) {G/13/129} and 69.3.
[132] Judgment [370].
[133] Hiscox Appeal Case at para 161 {B/6/196}.
[134] Argenta Appeal Case at para 69 {B/5/136}.
[135] QBE Appeal Case at para 58 {B/8/272}, emphasis added.

is obviously a likelihood that the disease poses a national or regional risk, and a real risk that measures will be taken at a national or regional level.

161. The third point is that there is no reason why the national response to a disease outbreak will only be to the area in which that outbreak is occurring. The Court below rightly noted that the occurrence of some diseases "*anywhere in the country, might very well, possibly depending on the nature of the insured's business, reasonably be expected to have an impact on it*" Judgment [138]. The example the Court below considered was an outbreak of foot and mouth disease, which is a notifiable disease in animals (covered only under RSA4 but not the other policies). That disease might lead to significant interruption with an insured's business (for example, through animal culling), even though the outbreak may be geographically very distant, and far more than 25-miles away. Returning to (human) notifiable diseases, the Court recorded that: (Judgment [138], emphasis added)

> "Given the severity of the SARS outbreak in 2002-2003 in various countries, it would in our view have been reasonably expected, at the time of conclusion of the contracts of insurance, that a significant outbreak of a SARS-like disease anywhere in the UK would have 'an impact' on an insured or (depending in part on what that business was), its business. That is not to say that the extent of the measures in the event taken in relation to COVID-19 or the extent of its effects on the population and the economy would reasonably have been expected, but some impact would be."

162. Elsewhere the Court noted that "*The parties thus knew or must be taken to have known that what was being insured… was business interruption deriving from a range of diseases some of which might spread over a wide and unpredictable area, and which might have an effect at a considerable distance from a particular case…*" (Judgment [160]). The Court therefore rightly concluded that "*when COVID-19 occurred, it was of such a nature that any occurrence in England and Wales would reasonably be expected to have an impact on insureds and their businesses*": Judgment [140].

163. This point is also significant in the context of the radius requirements in the policies and the protection they still give to insurers on the Court's construction, and is therefore returned to below.

Matrix point 4: The action will be to the outbreak as a whole

164. The fourth point is that public authority response will very likely be to the outbreak as a whole. The Court below recorded this in several places and it does not appear to be a matter of dispute on this appeal:

164.1. The parties "*must also have contemplated that the authorities might take action in relation to the outbreak of a notifiable disease as a whole, and not to particular parts of an outbreak, and would be*

most unlikely to take action which had any regard to whether cases fell within or outside a line 25 miles away from any particular insured premises" (Judgment [104]).

164.2. The disease "*may trigger a response of the authorities and the public to the outbreak as a whole*" (Judgment [110]).

164.3. Notifiable diseases "*may well produce a response from the authorities or the public which is to the outbreak as a whole, not to those parts of it which fall within "the Vicinity"… especially… if… "the Vicinity" is… a geographically proximate area which is smaller than that in which the impact of a notifiable disease may reasonably be expected to be felt*" (Judgment [143]).

164.4. "*The nature of highly infectious or contagious notifiable diseases is that cases in different areas will be related to each other, having spread from one source to multiple individuals in different places. As people move, the disease moves with them*" (Judgment [144]).

164.5. "*The parties thus knew or must be taken to have known that what was being insured… was business interruption deriving from a range of diseases some of which might spread over a wide and unpredictable area, and which might have an effect at a considerable distance from a particular case, including through the reaction of the authorities; and where it might well be impossible to distinguish whether that reaction was to the disease within or outside the relevant policy area*" (Judgment [160]).

164.6. "*If a notifiable disease manifested itself both within and outside the 25 mile radius it would be likely that there would be such governmental / public responses to the disease outbreak, rather than to specific cases of the disease, either those within or outside the radius.*" (Judgment [228]).

164.7. "*[W]hen one is considering notifiable diseases, it is not difficult to envisage that official responses will be to the full extent of an outbreak, and not necessarily specific to those in a given geographical area.*" (Judgment [273]).

165. The effect of this, and as the Court rightly noted, is that it may "*be difficult or impossible to show that the local occurrence(s) made a difference to the response of the authorities and/or public*" (Judgment [107]), and that "*It might well be impossible to distinguish whether that reaction was to the disease within or outside the relevant policy area*" (Judgment [160]).

166. It is worth briefly noting that these covers respond to outbreaks of disease and not merely individual cases, despite the occasional use of the word "*occurrence*". Argenta, QBE2-3 and RSA3 use the words "*an occurrence*" or "*any occurrence*" of a notifiable disease but it was common ground

with those insurers below,[136] and is common ground with them on this appeal, that this does not limit cover to the effects of a single case of a disease. That would, of course, make no sense in the context of an infectious disease and, for example, in the context of clauses which provide cover for diseases occurring in a 2,000 square mile circular area (the 25 mile radius clauses). QBE therefore expressly accepts that QBE1 responds to outbreaks, not single occurrences,[137] and accepted in the Court below that all of QBE1-3 may respond to "*a localised outbreak of a notifiable disease, including COVID-19*".[138] Argenta also describes its policy as providing "*cover for business interruption caused by occurrences of a notifiable disease*" and conceding that local restrictions such as those imposed in Leicester "*in response to a surge in Covid-19 cases in that city*" would be capable of giving rise to an indemnity.[139] MSAmlin similarly accepts that its cover is for "*proved cases of COVID-19 sustained within the 25 mile radius*".[140] These clauses therefore necessarily contemplate and provide cover for disease *outbreaks*, i.e. multiple occurrences of a disease.

Matrix point 5: The covers are almost all triggered by asymptomatic undiagnosed disease

167. The disease clauses variously require that the notifiable disease "*occur*" within the radius (Argenta, QBE2-3, RSA3), or that there be an "*illness sustained by any person resulting from*" a notifiable disease within the radius (MSAmlin1-2), or that the disease "*manifest*" within the radius (QBE1) (the position in relation to this aspect of Hiscox policies is dealt with separately in the part of this Case addressing those policies). The Court below decided that "*occur*" requires merely that there is a person with the disease in the radius such that it is diagnosable, whether or not it has been verified by medical testing, and whether or not it is symptomatic: Judgment [93] (RSA3), [158] (Argenta), [234] (QBE2), and Declaration 5. The same was true for

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[136] Argenta Trial Skeleton para 35(2) "*Argenta accepts that an 'occurrence' of Covid-19 for the purposes of Extension 4(d) requires there to be at least one person*" with COVID-19 in the radius {G/7/49}; QBE Trial Skeleton para 24 giving as an example of a situation which might be covered under its disease clauses "*A localised outbreak of a notifiable disease, including COVID-19*" {D/22/1619}; RSA Trial Skeleton Appendix 1 para 25 saying that there would be cover under RSA1 following the "*surge in coronavirus cases*" in Leicester and that there was cover "*because the closure/restriction would be a consequence of the manifestation of COVID-19 within 25-miles of the Premises*" {G/14/138}.

[137] QBE Appeal Case para 17 "*The risk to which these disease clauses is evidently directed is an outbreak within the area of the insured premises which causes a diminution in the insured's turnover… In the case of an epidemic (or even a pandemic), these clauses will respond to a local outbreak if it is proved that cases appearing within the insured area have caused the BI*" {B/8/260}; para 18 "*If the outbreak of disease within the designated area is shown to have caused the BI, the fact that there may be non-insured cases outside the insured area will not necessarily operate as a bar to cover: this will depend upon whether an outbreak within the insured area operates as a proximate or effective cause*" {B/8/260}. By contrast, note the suggested distinction at para 110 between cases within the radius which caused the action and cases within the radius which did not.

[138] QBE Trial Skeleton para 24 {D/22/1619}.

[139] Argenta's Appeal Case paras 21 {B/5/118} and 20(3), emphases added. See also para 67 "*the clause does not provide cover unless (and insofar as) occurrences of Covid-19 within 25 miles of the insured premises are a proximate cause of the loss*"; para 73(3), conceding there is cover before 26 March 2020 "*where a policyholder can demonstrate that is loss was specifically caused by occurrences of Covid-19 within 25 miles*"; para 73(4), admitting that in principle there is cover for local lockdowns such as that in Leicester "*because those restrictions were proximately caused by occurrences of Covid-19 within 25 miles of that guesthouse*".

[140] MSAmlin Appeal Case para 29 {B/7/215}. See, to similar effect, paras 15, 17, 18.2, and 31 among others.

MSAmlin1-2, and the words "*illness sustained by any person resulting from*": Judgment [196] and Declaration 6. Only in QBE1, and the word "*manifest*", did the Court decide that cover only responded if cases were symptomatic or diagnosed: Judgment [224] and Declaration 7. None of these findings are the subject of appeal.[141]

168. This is material when construing the policies because it shows that these policies do not only respond where there is a case of the disease known to the authorities in the area, i.e. where interruption is caused by authorities reacting to a documented spread. They also necessarily contemplate cover for business interruption caused where the presence of the disease is not even verified in the relevant policy area, correctly anticipating that authorities faced with an infectious disease need to act quickly and will very often react to both known and diagnosed cases, and equally (if not more) importantly unknown and suspected cases.

The meaning and purpose of the 1-mile or 25-mile radius provision

Introduction

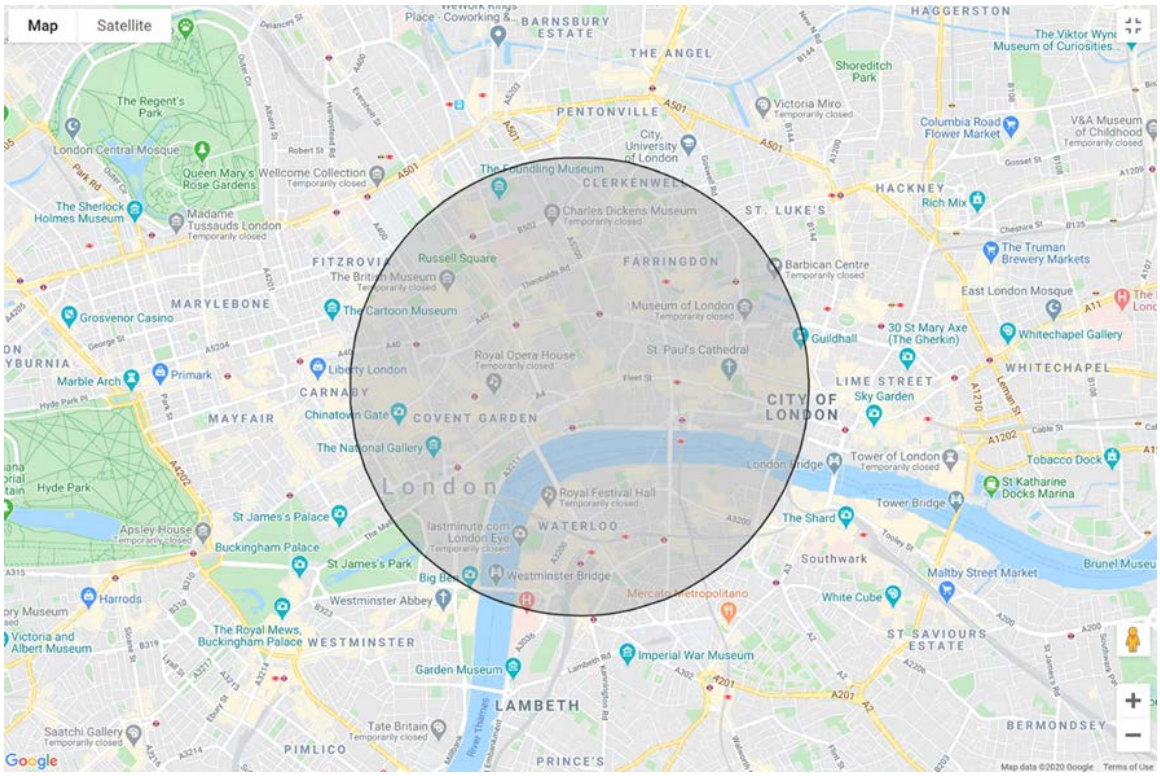
169. Argenta, Amlin1-2, QBE1 (and QBE2) and RSA3 each have a 25-mile radius provision. Hiscox4 and RSA1 (and QBE 3) have a 1-mile provision. This is to be contrasted with cover in these and other policies which only responds to a notifiable disease occurring at the premises. Of the hybrid clauses, Hiscox1-3 has no radius provision at all.

170. The FCA's central argument as it relates to the radius provisions is that the parties cannot have intended that the part of a disease which is outside the radius could be set up as a countervailing cause which displaces the causal impact of the disease inside the radius.

171. A 1-mile radius of the Royal Courts of Justice stretches as far as Piccadilly Circus to the west and Cannon Street to the east, covering 3.14 square miles. A 25 mile radius stretches almost as far as Maidenhead to the west and Basildon to the east, covering an area of 1963.5 square miles. It is important to appreciate the size of this 50-mile wide bubble. It is bigger than any city in the UK; greater than three times the size of Surrey; roughly the combined size of Oxfordshire, Berkshire and Buckinghamshire; and around a quarter of the size of Wales. The following maps (deployed at trial) demonstrate this:

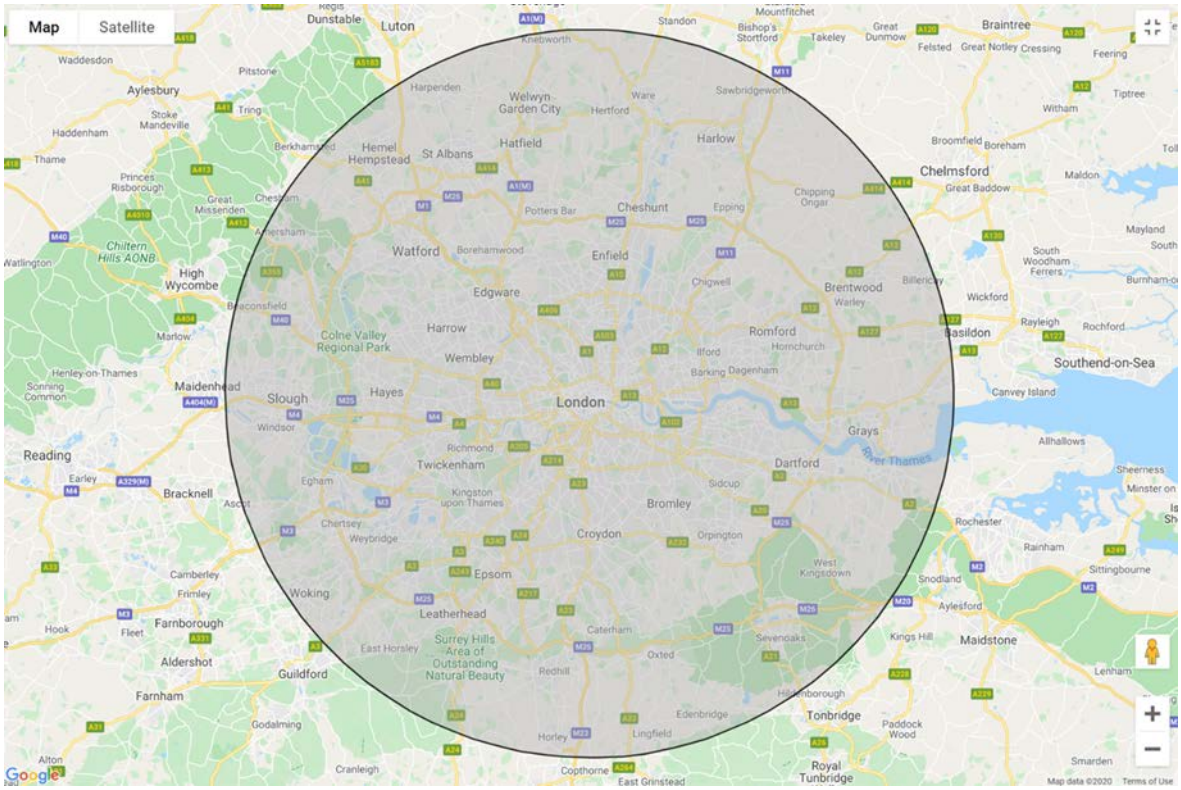
[141] The High Court also gave rulings as to the types of evidence that policyholder could rely on to establish that COVID-19 had occurred or manifested within a given radius of their premises on or by a given date, which are contained in Declaration 8 {C/1/3-5}. These are not being appealed.

Map showing 1 mile radius around the Royal Courts of Justice[142]



[142] Maps created using https://www.mapdevelopers.com/draw-circle-tool.php

Map showing 25 mile radius around the Royal Courts of Justice



172. It is difficult to think of a situation in which an infectious disease occurring 25-miles or even 1-mile away from the premises could directly interrupt or interfere with the policyholder's business. Unlike a case of disease at the premises, there is no obvious need for the insured to close its business for cleansing or disinfection where the disease is that far away. The risks come not from direct effects but from the disease being infectious and having the potential to spread over a wide area and public authorities responding to that: cases of SARS being diagnosed in Croydon or Twickenham or Welwyn risk interrupting the RCJ because of the risk they might spread (most obviously as people commute), the prevention of which by the authorities is the likely basis for the interruption or interference, and in any event a risk inherent with an outbreak of a notifiable disease (with all that that entails, as described above).[143]

173. Any diseases spreading towards the RCJ will also be spreading away from it, and will (of course) already be spreading away from the origin(s) of the outbreak. This is in the nature of infectious diseases, which spread in all directions and pay no regard to policy radii (as the Court repeatedly commented). Therefore even an outbreak of such a disease away from the premises that starts

[143] With respect, the cases identified by insurers as an attempt to explain this without considering an epidemic (the hotel with the weekend opera package that is 10/15/20 miles away from Glyndebourne, or the music venue that suffers because the student halls of residence 20 miles away is infected: Day7/80 {G/28/207}) were contrived and very narrow.

within the 1 mile or even 25 miles radius will be one that is spreading or likely to spread both within and outside the policy radius, and is triggering public authority action (perhaps by central government) that operates over a wide area, and which may interfere with the premises through indiscriminate measures. As noted above, the authority response will often be to the outbreak as a whole, and not just one part of it.

The purpose of the radius requirement and how it operates in a normal case

174. To understand how the radius requirement works in practice it helps to consider the two core cases in which a business is interrupted by a disease which is distant from the premises.

175. Take the core case covered by these clauses: a non-national but still substantial outbreak of a notifiable disease which spreads across Oxfordshire, Berkshire and Buckinghamshire (i.e. 2,000 square miles), and which causes interruption or interference through public authority action to policyholders sited in those counties.

176. On the FCA's case, the insured has to prove that the disease was present within 25 miles or 1 mile of the premises. If so, then they have recovery for interruption or interference caused by authority action taken in response to that outbreak.

177. On the appellant insurers' case, the only policyholder who would confidently have cover in this situation would be the hypothetical (and it would be hypothetical) policyholder who was located right at the middle of a perfectly round disease outbreak, because he or she is the only one who could confidently say that all the cases to which the public authority was reacting were within 1-mile or 25-miles of his premises. Every other policyholder would have some cases within and some cases outside the policy area and would need to establish (i) exactly what cases of the disease (both actual and suspected) the public authority was reacting to when it took the relevant action; (ii) which of those (actual and suspected) cases were within a 25-mile (2,000 square mile) or 1-mile (3 square mile) radius of their premises; and (iii) exactly how the public authority would have acted if those cases had not occurred, but all other cases had.

178. This is totally unrealistic. As soon as one leaves the hypothetical policyholder at the centre of an outbreak, it may become difficult if not impossible to establish <u>any</u> of (i) to (iii) above. Local or other public authorities do not publicly expound on the locations of which cases they were responding to (let alone with the precision needed to determine if cases were just inside or just outside the radius), or the extent to which they were responding to suspected or potential future cases and where, nor do they explain how they would have reacted to a different hypothetical outbreak – or, assuming 100 policyholders within the 50-mile-wide circle, to 100 different

hypothetical outbreaks (because the hypothetical would be different and need to be considered for every single insured).

179. The problem will be compounded where, as will inevitably be the case if a disease spreads, the outbreak spreads in an irregular and unpredictable way. It will no longer be within a perfect circle and even the person who would have been able to recover had the disease been confined within a perfect 25 mile radius circle in which the policyholder was precisely in the middle will now be confronted with the same difficulties on insurers' approach.

180. The most important point about this example is that it is not a hypothetical chosen because it produces extreme results (and nor is it a pandemic). It is not like Argenta's fantastical example of a policyholder seeking to claim because someone with a notifiable disease flew over their premises,[144] or MSAmlin's illustration of an islander relying on a COVID-19 case sailing within 25-miles of their disease-free island.[145] This is a disease outbreak spread over a few dozens of miles, the archetypal outbreak of a contagious disease that would lead to public authority action and is contemplated by these disease clauses. Yet even in that main and basic case, the cover provided by the appellant insurers is, on their interpretation, almost illusory.

181. The second, shorter, illustration of how the radius works to limit insurers' risk in a normal case is a policyholder whose business is interrupted by a disease spreading over 100 miles away, e.g. through a national travel ban to prevent any further spread of the disease outside the affected area. As the Court recorded Judgment [138]:

> "Given the severity of the SARS outbreak in 2002-2003 in various countries, it would in our view have been reasonably expected, at the time of conclusion of the contracts of insurance, that a significant outbreak of a SARS-like disease anywhere in the UK would have 'an impact' on an insured or (depending in part on what that business was), its business."

182. In this case, if the public authority's precautionary action affects that policyholder's business, neither a 1- or 25-mile policyholder will have cover. The radius limit is excluding cover. If, of course, the outbreak was 10-miles away, then the policyholder with a 25 mile radius would have cover but the other with a 1 mile radius would not.

183. The appellant insurers are therefore wrong to say that the FCA's interpretation renders immaterial the vicinity limit, and means there is no difference between a policyholder with a 1-mile limit and one with a 25-mile limit.[146] The radius ensures that a purely remote disease does not give cover to the policyholder, even if it does cause interruption or interference with the

[144] Argenta Appeal Case para 74(1) {B/5/140}.
[145] MSAmlin Appeal Case para 41 {B/7/220}.
[146] See, for example, Argenta's Appeal Case para 74(4) {B/5/141}; MSAmlin Appeal Case para 39 {B/7/219}.

business. The smaller the radius, the less likely the interfering disease will come within it, and the smaller the insurer's risk. The Court directly considered and rejected the insurers' arguments on this point, holding that on the FCA's interpretation the radius stipulation still "*makes good sense*"[147], because:

> "109… It has the effect that diseases which make no local appearance cannot lead to there being cover. While it is possible to think of anomalous cases, where it is a matter of chance whether an infected person came within the 25 mile radius or not, it appeared to us that any such anomalies were considerably less significant that those inherent in RSA's interpretation, some of which we have indicated already.
>
> 227… On this interpretation, cover is provided for the effects of a notifiable disease on the business, if the disease has come to or within the specified distance of the premises; and is not provided solely for the consequences of the particular manifestation of the disease by one or more individuals who happen to be within the radius. On this basis, what would be significant is the fact of the disease having been (relatively) close, not whether it was the particular case(s) within the radius which had had any specific effect."

184. The choice of radius distance determines how close the outbreak has to come for the policy to be triggered. A smaller radius means that more outbreaks affecting the premises (due e.g. to preventative public authority action around the outbreak) will fail to trigger cover as being remote-only. An epidemic is covered, but only if the premises are sufficiently close to it. A remote-only epidemic is not covered.

185. It is easy to conceive of differences in cover with different radius limits: take two policyholders whose business is interrupted by a disease outbreak in the nearest village or town, or other side of the city, which may be 3, 5 or 10 miles away. The 25-mile radius policyholder will have cover, but the 1-mile radius policyholder will not. It may be that on the present facts an insurer with policyholders in central London is unlikely to see any difference between whether it is paying out on its 1-mile or its 25-mile policies. But that is the product of the present facts, and does not evidence a flaw in the FCA's case (and even in the pandemic, which clause someone has may make a difference in less populated areas as to whether or when the policy is triggered).

The impossibility of dividing up public authority response to a disease outbreak

186. For insurers to argue that they have given cover for a disease with epidemic potential and across an area a quarter of the size of Wales, but at the same time say that there is probably no cover when that disease becomes an epidemic (because the disease outside the radius is the 'true cause' of any loss), is self-contradictory. As set out above the Court rightly found that it would have been envisaged when the policies were entered into that there may well be public authority

[147] Judgment [227].

actions over a wide area in relation to a disease outbreak as a whole, straddling any 25-mile or 1-mile perimeter, and these findings are not challenged.

187. In those circumstances, it is illogical and uncommercial for the parties to have provided cover for business interruption attributable only to cases within a policy radius. Given that it will often be impractical and impossible to distinguish the causative effects of cases of the disease within and outside the area where the outbreak straddles the perimeter, such a conclusion would be uncommercially and arbitrarily to cut back the scope of clauses tailored specifically to the most serious contagious diseases to outbreaks that in substance fall only within the perimeter. That must be the consequence of insurers' argument because as the Court observed at Judgment [160], proving that cases of the disease with the area were the only cause of the public authority action where there are also cases outside the policy area often simply cannot be done (emphasis added):

> "The parties thus knew or must be taken to have known that what was being insured under Extension 4(d) was business interruption deriving from a range of diseases some of which might spread over a wide and unpredictable area, and which might have an effect at a considerable distance from a particular case, including through the reaction of the authorities; and where it might well be impossible to distinguish whether that reaction was to the disease within or outside the relevant policy area."

188. The parties would therefore not have intended that an outbreak be divided into two, inside and outside the radius, and a hypothetical exercise undergone to decide how the world would have been different with one part but not the other part (whether by a guesthouse or holiday cottage owner claiming under a cover with a £25,000 limit—Argenta, by a leisure business claiming under a 3 month limit—MSAmlin2, or by a nightclub owner claiming under a £100,000 limit—QBE2). The outbreak is and would have been reasonably anticipated to be an indivisible cause—or the interruption/prevention is and would have been reasonably anticipated to be an indivisible harm—in every sense, as was found in *The Silver Cloud*. That case is discussed below (paragraphs 451ff) but for present purposes it need only be said that, as to the events of 9/11 and the state warnings that followed, it was "*simply impossible to divorce anxiety derived from the attacks themselves from anxiety derived from the stark warnings issued in the immediate aftermath*" and "*impossible to divorce the effect of the warnings from the effect of the events which they so swiftly followed*" (Tomlinson J at [68]).[148]

[148] {E/18/420}. That approach was not challenged on appeal, with Rix LJ summarising the judge's findings as: "*the deterioration in Silversea's market was inextricably caused directly both by the warnings and by the events themselves*" (emphasis added): Court of Appeal para 100 {E/19/442}. See also Judgment [534]: "*we regard that case as being one which turned on the factual conclusion of Tomlinson J at [68] that it was impossible to divorce the effect of the US Government warnings (the relevant insured peril) from the effect of the 9/11 attacks (which on this hypothesis were not insured*".

Textual points in the policy

189. There are two key textual points which support the FCA's interpretation. The first is a short one, described by the Court as "*fundamental*": the parties did not explicitly or implicitly within the relevant clauses specify that the interruption must result *only* from the disease within the area: Judgment [102]. The Court below rightly regarded this as a significant textual point, relying on it for its conclusion on RSA3 [102], RSA4 [142], Argenta [160-161], and QBE1 [226]. Of course, anything can be made more clear by drafting, in either direction, but against the backdrop of the nature of the cover (notifiable diseases) that omission was (correctly) thought more telling by the Court than the omission to make clearer the adjectival status of the radius clause.

190. This must be right. If an insured under a 1-mile clause is in the centre of an outbreak that happens to be more than 2 miles wide, the insured would reasonably be entitled still to expect cover if a public authority shuts down the entire area of the outbreak, and if it loses trade as a result. An insured opposite the Royal Courts of Justice that has its business interrupted or interfered with by the public authority response to an outbreak of disease in central London, where there were numerous cases of the disease within a 1 mile radius, would reasonably be entitled expect there to be cover under the policy notwithstanding that there were also numerous cases in Euston to the north, Lambeth to the south, Mayfair to the west and Whitechapel to the east, all outside the 1 mile radius. The difficulty of explaining why the insured does not have cover by reference to the wording ("yes, although the disease outbreak caused your losses and part of that outbreak was within 1 mile of your premises, you have no cover because the disease outbreak to which the authorities responded was also beyond the 1 mile radius and therefore the part of the disease outbreak within 1 mile of your premises was not the sole cause your losses") rather indicates that the insurers would have had to draft far more clearly if they had wanted their standard form wordings[149] to be limited in the way they now contend. This is not, as insurers suggest, an improper resort to some *contra proferentem* rule of construction amounting to an appeal to the reasonable expectations an insured, but simply that the result in such a case that no business in central London with a 1 mile policy could recover any indemnity because the outbreak to which the authority was reacting extended beyond the perimeter (and insurers have never explained why that would not be the consequence of their

[149] As pleaded in the FCA's Particulars of Claim para 32 {D/16/1580} and admitted in Arch Defence para 29 {G/17/151}, Hiscox Defence para 69 {D/19/1597}, MSAmlin's trial skeleton para 14.4(c) {G/13/125}, QBE Defence para 41.3 {G/20/165}, RSA Defence para 31 {G/19/160}; and see the FCA's Reply paras 4 {D/18/1589} and 40 {G/21/168}.

construction) is so remarkable that if that was intended it ought to have been clearly spelt out, for example by use of the word "only" in the appropriate place.

191. The second textual point is the relevance of a lack of a pandemic exclusion. The FCA does not rely on the absence of pandemic exclusions to prove that the policies cover pandemics. It is rather that, in circumstances where the policies contemplate (and naturally include) disease outbreaks that could amount to a pandemic, if the parties intended that there would be effectively no cover for a pandemic disease when it becomes a pandemic disease, the policies would have said so. There are various ways this could have been done. One is to have said that cover was for interruption which was attributable only to the disease within the radius (addressed above), or that there was no cover if, or to the extent that, the interruption was concurrently caused by the same disease outbreak outside the radius. Alternatively, the policies could have provided express exclusions for pandemic diseases (for example Hiscox1 and Hiscox4 have a "Cancellation and abandonment" extension which is subject to an exclusion in respect of action taken by any national or international body or agency directly or indirectly to control, prevent or suppress any infectious disease). A further alternative is that the policies could have selected an exhaustive list of pre-existing notifiable diseases which, due to advances in medicine, were no longer considered to have the potential to become a pandemic. It is the failure to do any of these things, combined with the nature of the disease, which is significant.

192. The appellant insurers say that the because the Shorter Oxford English Dictionary defines the word "*within*" as meaning "*inside or not beyond*",[150] there must only cover for the part of the outbreak "*inside, not inside and outside*" the radius and that meets the point the Court made about the absence of the word "only".[151] Yes, 'within' is only referring to the part of the outbreak that is inside, and that any part beyond a 25 miles radius does not trigger—it is not disputed that there must be some of the outbreak that is 25 miles or fewer from the premises—but it does not mean that there cannot exist a part outside or that that external part can negate cover. That is a further question of construction. The ordinary usage when describing a wider geographical area points the other way: saying that a disease or storm or fire came within 5 miles of premises just means that part of the storm came within 5 miles of the premises.

193. MSAmlin says that the Court's approach can be seen to be fallacious if applied to the 'notifiable disease *at the premises* or due to food or drink supplied *from the premises*' clause in MSAmlin1-2 (in

[150] This definition being as a preposition, which is the sense in which that word is being used in the disease clauses (and not as an adverb, so definition A1 is not right).
[151] RSA's Appeal Case at para 43(a) {B/9/306}, Hiscox's Appeal Case at para 116 {B/6/186}, MSAmlin's appeal case at para 25.1 {B/7/213}.

contrast with the radius disease clauses here).[152] It says that the logic of the Court's reasoning is that once there is a case of disease at the premises, there can be recovery for all the consequences of the national or even global pandemic. This logic does not work.

194. Each clause must be construed in its particular context, but at least where, as here, these clauses exist alongside radius clauses, the nature of the cover provided by these 'at the premises' clauses is different because the contemplated interruption (and authority action) caused by a disease occurring at the premises will be different to interruption (and authority action) caused by a disease occurring away from the premises. In the former case, the premises is likely the source of the disease (as is explicitly required in relation to a food or drink part of such clauses), and the risk is that it continues to produce that disease or illness—as in the case of Legionnaire's disease or food poisoning, and/or that the disease may get out of the premises and, in so doing, spread to others. The clause envisages measures directed specifically at the premises to stop that repetition or spread; measures that would not be taken on a national or wide area basis. The fortuity is therefore, as a matter of construction, contemplating and limited to the at-the-premises aspect of any disease, not a wider outbreak.

195. The radius clause is different; it recognises instead that the insured could get caught up in measures which are not directed at or specific to the policyholder at all, but which are taken to suppress an outbreak of a notifiable disease that is present anywhere within that radius, including for public health reasons. The reason the business is interrupted is usually (where any case within 25 miles triggers the clause) not because of a concern that the premises is a source of infection, nor that the fabric of the premises may itself become infected. The primary reasons are more likely that the disease may be spread by people being in close proximity to each other (which the authority aims to prevent), as a result of travelling to or from of visiting or working at business premises (either generally or of within categories into which the insured's business falls); and/or that an outbreak will suppress the insured's own trade, such as by reduced footfall. In those circumstances, 'within a radius of 25 miles of the premises' is adjectival and the intention is to cover outbreaks inside and outside the radius, whereas 'at the premises' limits the fortuity requiring a link between the occurrence at the premises and the interruption.

The new, 'rough brake on accumulation' point

196. QBE identifies what it says is the crucial significance of the radius limit from the point of view of insurers: it establishes "*some rough brake on the potential for accumulation of losses across the insurers'*

[152] MS Amlin Appeal Case para 42 {B/7/221}, also Argenta Appeal Case para 74(3) {B/5/140}.

book of BI business", and the "*huge potential for loss accumulation inherent in [the FCA's] reading [has] the look of an aberration*".[153] RSA equally rails against the suggestion that it should be held liable for "*anything approximating to highly correlated losses across the entire pool of policyholders as a result of a national/global pandemic*".[154] MSAmlin says it is a "*simplistic… limit to the scope of the cover*".[155]

197. This point sounds suspiciously like an argument that the Court should avoid a conclusion which exposes insurers to a large liability. That is obviously a bad argument. It is also inconsistent with insurers' reliance on the unprecedented nature of what has happened in relation to COVID-19 and their criticism of the FCA for, as they would have it, trying to shoehorn cover for unforeseeable consequences into policies that could not have contemplated such circumstances. That is because on this hypothesis the insurers have specifically contemplated the accumulation risk of a possible pandemic and in order to avoid it specifically excluded the pandemic risk through the radius provisions. It is also rather surprising that this point is said to be of crucial significance yet was overlooked by all the insurers and their teams at trial. But irrespective of both these points, the actual substance of the point does not work even on insurers' own cases: all insurers (including QBE) accept that if COVID-19 had spread differently, and if the public authority response to it had been a series of local lockdowns rather than one national lockdown, then its policyholders would likely have cover.[156] It is not therefore, on insurers' own case, large outbreaks that the provision excludes, but large outbreaks responded to nationally rather than by tailored local responses. The result of insurers' argument therefore is that the radius limits give cover for pandemics that develop slowly but not for pandemics that develop quickly. That makes no sense – this is addressed further below. Further, the policies do not show any consistent intention to exclude correlated/wide area losses (covering storms, riots, floods, the loss of electricity supply).

198. If the insurers had intended to limit cover for some of the most contagious diseases in England to local measures (as QBE contends[157]) in such a dramatic way then it would have said so, for example by inserting the word "only" before the word "within" or excluding 'any action taken by any national or international body or agency to control, prevent or suppress or in any way relating to any infectious disease' (and exclusion found in Hiscox's event cancellation cover[158]).

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[153] QBE Appeal Case paras 20 {B/8/261} and 44.
[154] RSA Appeal Case para 43(e)(v) {B/9/308}, and to similar effect fn 1.
[155] MSAmlin Appeal Case at para 38 {B/7/219}.
[156] See QBE's Appeal Case para 17 {B/8/260}.
[157] QBE Appeal Case para 17 {B/8/260}.
[158] clause 19 {C/6/402}.

199. Another, simpler way of limiting the level of the accumulated loss is to have a sublimit or a specified indemnity period for disease covers. This is, in fact, what the insurers have done. Most of the policies do have such limits, many of them[159] specific to the disease clause, and they show a varied appetite as one would expect.

The 'postcode lottery' point

200. Insurers make much of the claim that the Court below's conclusion, and the FCA's case, leads to a 'postcode lottery', arguing in short that whether a policyholder has cover depends on the happenstance of whether a single person with COVID-19 happened to wander into their policy radius.[160] But that is just the product of any radius requirement. If a policyholder's premises was closed due to a person with SARS who came within 10 miles of the premises, there would be cover if they had a 25-mile disease clause, but not if they had a 1-mile disease clause. A number of policies have qualification requirements for cover (such as that an incident, denial of access or interruption must last at least 8, 12 or 24 hours in RSA4, Arch and Hiscox4[161]—just under and there is no cover) so having a qualification requirement in relation to the disease cover is by no means exceptional. Furthermore, such a qualification requirement reflects the reality of the disease risk whereas insurers' approach really is like a lottery in which either no-one recovers and insurers can "roll over" the prize of indemnity to another disease outbreak or only the lucky few whose business happens to be at the geographic centre of the pattern of spread of the outbreak (which need bear no relationship to the origin of the outbreak), and whose local authority happens to react before the disease spreads outside the radius, get the "prize" of actually being indemnified for their losses.

201. QBE gives the example of two businesses which are identical in every fashion apart from their location, one being within 25-miles of a case and one not being within 25-miles of a disease, but both suffering the same loss.[162] One will have cover and one will not: but that is just the inherent result of a radius limit. That does not demonstrate some fundamental flaw in the FCA's interpretation, because this same result occurs whatever the interpretation of the clause: it is just the effect of needing to show the disease occurring within the radius. The 'postcode lottery' is the product of the radius requirement, and occurs even on the appellant insurers' case just as

[159] MSAmlin1-2, QBE1-2, RSA3.
[160] See MSAmlin's Appeal Case at para 41 {B/7/220}, QBE's Appeal Case at para 46 onwards {B/8/268}, and RSA's Appeal Case at paras 30 {B/9/301} and 43.
[161] Further afield, e.g. QBE1 BI covers the costs of replacing an employee lost to a lottery win, but only if they resign within 14 days of the date of the win. Is 13.5 days different to 14.5 days?
[162] QBE Appeal Case para 47 {B/8/269}.

much as it does on the FCA's case. Indeed, as explained above, insurers' approach is even more of a lottery.

202. Contrary to RSA's suggestion,[163] the FCA and Court's interpretation no more renders the disease clauses dependent upon random/non-causal chance than the insurers' interpretation. Insurers' complaint of an aleatory bargain misses the mark. On either interpretation, the interruption has to result from an insured fortuity, it is just that RSA disagrees as to what that fortuity is. As above, on the correct construction the fortuity is disease, where it is has come within a particular distance of the premises.

Further anomalies on insurers' interpretation

203. The appellant insurers argue that their clauses are only intended to cover interruption insofar as it was caused by the part of a disease outbreak which is within the radius, but not to the extent that it was caused by any other part of the same outbreak which is outside the radius. This, they say, means that (i) any part of the disease outbreak beyond the radius is to be treated as a separate and independent cause of interruption and loss, and (ii) there is only cover for interruption which was caused 'but for' the outbreak within the radius; in other words, for interruption which was attributable to the 'bit of the disease' in the radius.

204. The more fundamental problem with this approach is that disease outbreaks do not occur at a particular time or in a particular place.[164] They take place over time and spread in unpredictable ways and this would have been obvious when these policies were entered into. Take a hypothetical outbreak which is in a rough 26-mile radius circle, with a policyholder at the centre with a 25-mile disease clause. Insurers' counterfactual requires the parties to consider whether the policyholder would have suffered the same interruption or interference if only a 1-mile thin, ring donut-shaped disease outbreak occurred. But outbreaks do not occur like this: there is no realistic counterfactual in which an authority reacts to a 1-mile thin, donut-shaped disease outbreak. Nor would the outbreak remain like this: infectious diseases do not solidify, but they move, often quickly and unpredictably. The counterfactual needs to take that into account, because it is not considering a snapshot, but how the world would have been over the period of the interruption or interference, which may be days, weeks or months. The counterfactual

[163] RSA Appeal Case paras 26-31 {B/9/300}, relying on *Becker, Gray and Company v London Assurance Corporation* [1918] AC 101 {E/10/172} where the loss was proximately caused by the captain voluntarily abandoning the voyage, not war, and on the proper construction of the peril in that case there was no cover. That assists not at all with the present case. See also Hiscox Appeal Case paras 116-9 {B/6/186}.

[164] A point which all the appellant insurers seek to make: see the Appeal Cases of Argenta paras 77-81 {B/5/142}, Hiscox para 113 {B/6/185}, MSAmlin para 31 {B/7/216}, QBE para 29 {B/8/263}, RSA para 42 {B/9/305}.

therefore either needs to assume that the disease would spread back inside the radius (even though that is presumably prohibited by the counterfactual), or that, for some reason, there is an impregnable 25-mile circle which the disease cannot enter. Neither of these is remotely realistic and shows that this is not an exercise that the parties can have intended.

205. A further anomaly is apparent from a similar hypothetical. Take a disease outbreak which starts 10-miles away from the premises (on Monday), then progressively moves outwards 10-miles further away, every day, until the following Sunday, when the furthest reach of the outbreak is 70-miles away (covering a total of 140-miles). On insurers' case, if the authority acts on Monday or Tuesday then there is cover – but only until Wednesday, or Thursday or later, and not if the authority does not act until then – even though the authority is reacting to precisely the same outbreak. It is not obvious why the parties would have intended this result. This is, again, a real-life example: if (local lockdown) measures are introduced in Manchester, and then expanded to the whole North-west of England as the disease outbreak spreads, the policyholder initially has cover but then (potentially) loses it again. There is no commercial reason for this.

206. A similar anomaly was identified by the Court below at Judgment [106]:

> "Equally, and on a more general level, it is not difficult to conceive of a disease which spread rather more slowly than COVID-19, which triggered a series of local lockdowns or other public health measures, which ultimately covered all or large parts of the country. On RSA's case, if the local measures were caused by the occurrence of the disease within the 25 mile radius, then there would be cover for their effects. But if the disease developed and spread more quickly, so that the response was national, and simultaneous, then there would be no effective cover in any area, because the response was not taken specifically in relation to any particular area."

Indeed (as came out most clearly from Argenta's submissions at trial) the national action by government would be the death knell for any claims—and a get-out-of-insurance-free card for insurers—because all local effects of the disease were obliterated by a national response (see Judgment [162]).

207. This is anomalous because there is no commercial reason why the parties would intend to cover slower-spreading diseases or those where the public authority is more nuanced in tailoring its measures to each locale to faster-spreading diseases where blanket national or regional measures are imposed. From the insured and the insurer's point of view the risk is the same; the harm is the same (the business has been closed because of a public authority reaction to a notifiable disease).

208. The insurers do not like discussions of common sense.[165] They say that even if their construction produces far more anomalies that does not dictate the right construction. But they do not and cannot say that which construction makes more commercial sense is not important to identifying the right construction.

Conclusion on construction

209. This entails the following conclusions as a matter of construction:

209.1. The requirement that the disease be within 25 miles or 1 mile of the premises is part of the preconditions for cover but is merely "*adjectival*"; there is cover for the effects of the disease both inside and outside the area, but only "if"/"provided that" and from when it came (with at least one case) within the specified distance (Judgment [102, 110, 144, 161, 196, 227, 255, 532]. The cover is for notifiable disease which has occurred within the radius, not only for notifiable disease within the radius (Judgment [102]).

209.2. The disease inside and the disease outside the area were for causation purposes one "indivisible cause" (Judgment [111, 134, 147, 165, 532]), and the disease outside the area was not intended to be "alternative, uncovered, causes" to the insured peril which can be relied upon for causation purposes by the insurers (Judgment [110, 144, 164, 191]).

Applying causal questions in light of the High Court's construction

The causal links within the peril

210. The final element is the need for cover is for the policyholder to establish interruption or interference "*following*" (MSAmlin1-2, RSA3), "*as a result of*" (Argenta), "*arising from*" (QBE1) or "*in consequence of*" (QBE2-3) the notifiable disease.

211. There are some disputes as to the meaning of these terms, and whether they require proximate cause or something else, but those disputes only really arise in relation to the Concurrent Cause alternative route of the Court. If the insured peril includes the disease inside and outside the perimeter, and therefore they are indivisible, and/or the disease outside the perimeter cannot be a rival cause, then no causal connection issue arises (even if the connection had to be one of proximate case, no insurer seeks to identify a rival and displacing proximate cause for

[165] MSAmlin Appeal Case para 43 {B/7/221}, Argenta Appeal Case para 72(1) {B/5/137}.

interruption other than COVID-19, as far as the FCA is aware) (see Judgment [111, 113, 165, 425]).

212. Even if these connectors required the application of a but for test (which they do not, see Judgment [194]), again there is no problem as without COVID-19, i.e. removing COVID-19 outside the perimeter as a rival cause, none of the interruption complained of would have occurred (see Judgment [110]).

213. These issues arise only if the Supreme Court overturns the High Court's conclusions on construction, in which case the alternative case, discussed below, applies.

Proximate cause

214. As outlined above, proximate cause (under the test designated by section 55(1) of the Marine Insurance Act 1906, which is explicitly subject to the policy providing otherwise) applies to the link between the peril as a whole and the loss. This does not include a but-for test, although one is imposed by the quantification machinery/trends clauses when calculating the indemnity (and it is accordingly discussed immediately below).

215. On the Court's construction, there is similarly no problem in satisfying proximate cause. No insurer is understood to advance a rival proximate cause to the interruption or COVID-19. See further Judgment [110, 532, 535].[166] So, while RSA points out that underlying causes and remoter causes are not necessarily proximate causes,[167] it is not believed to argue that, for example, the national measures taken in March 2020 were <u>the</u> proximate cause of interruption such that COVID-19 (the specified peril) was not even <u>a</u> proximate cause of it. Plainly the public authority action was the means (indeed, and as QBE agrees, the expected and usual means[168]) by which the insured disease impacted the business, and not a rival cause, and no insurer argues the contrary.

216. Argenta and RSA in particular are very exercised by the question of whether the peril (and so the 'Damage' within the trends clause) includes the interruption or not,[169] as the Court rightly found that the proximate cause test is between loss and the peril including interruption.[170] Argenta says that the peril does not include the interruption, because just as in a property case

[166] "*[H]owever many proximate causes there are they are all insured"* (Judgment [535]).
[167] RSA Appeal Case para 65 {B/9/316}.
[168] QBE Appeal Case para 58 {B/8/272}.
[169] Argenta Appeal Case paras 22-32 {B/5/123}, RSA Appeal Case paras 36-40 {B/9/303}.
[170] The argument was most clearly advanced by the HIGA intervener group in their Trial Skeleton at paras 11 {G/10/95}, 22, 82, 92, 138, 142, 143, 150, 160.

one has to ask what was the proximate cause of the property damage and the loss sustained is just a pecuniary measure of that damage, similarly in a BI case one has to ask what was the proximate cause of the interruption.

217. There are three immediate observations to make. The first is that this rather highlights the dangers of using 'insured peril' as a unitary fundamental concept applicable in the same way at all stages. The second is that it depends which policy one is looking at. The third is that the point in any event makes no difference to the issue before this Court on this case.

218. In a property policy, the indemnity is a pecuniary measure of the damage. But there is no provision permitting recovery of consequential losses resulting from the Damage. Instead, there is recovery for the cost of repairs as specified in the quantum machinery. In contrast, in most BI policies there is a broad indemnity for loss of income etc 'resulting from' interruption of or interference with the business. Most of the disease and other policies specify that explicitly. In those cases, the proximate cause of loss must be the peril which includes an operative impact on the business, namely the interruption or interference. The proximate causal link must be between the loss and the peril (Judgment [94-5, 147]). If the disease causes interruption, the interruption causes the business employees not to come to work, and as a result of staying at home a key employee is exposed to COVID-19 through contact with a neighbour which would not have occurred but for the employee not going into work, any loss attributable to the loss of that key employee would not be recoverable as not proximately caused by the interruption (although it was 'but for' caused by it). The insurers need a proximate cause test at that stage, and they have one,[171] and the quantification machinery and trends clause adjusts as necessary the recoverable loss for the interruption or interference. (RSA's approach that the interruption is merely descriptive and should be ignored as the cover only requires a link between the underlying event and the loss[172] must be wrong as it gives the explicit requirement of an interruption/interference, i.e. the operative impact on the business, no content or role. Indeed, RSA's argument on this point generally is also inconsistent its own plea in its Defence that "*the peril insured by the disease extension is [1] "interruption or interference…" [2] "following" [3] "the occurrence of a Notifiable Disease within a radius of 25 miles of the Premises*".[173])

219. Within the peril, i.e. when looking at whether the disease caused the interruption, one merely applies the causal test prescribed. Where the term is 'resulting from' the FCA accepts that will

[171] See also FCA Appeal Case para 56 {B/2/49}, and paragraph 228 below.
[172] RSA Appeal Case para 38 {B/9/304}.
[173] RSA Defence para 80 {G/19/164}.

require a proximate cause test - was the disease an effective cause of the interruption: the FCA does not argue that with such language the interruption need not be proximately caused by COVID-19 (there is no dispute on that point, and Argenta is aiming at the wrong target in its argument to the contrary[174]), nor did the Court's judgment depend upon such a step. Argenta's arguments that the Court did not require or find proximate cause between the loss and the occurrence of COVID-19[175] simply misreads the Judgment: the Court's express conclusion was that "*the proximate cause of the business interruption is the notifiable disease of which the individual outbreaks form indivisible parts"* (Judgment [532], also [111]). In applying that causation test, though, one has to bear in mind that the parties necessarily would have contemplated that the effect of the disease would be indirect, in that it would cause a reaction from public authorities and/or the public which would have the requisite operational impact on the business.

220. Once again, the dispute between Argenta and the FCA is as to how one reads the "within 25 miles" requirement, not where the proximate cause test is to be applied. What Argenta does not like is the construction conclusion as to the essence of the fortuity, whether the combined consequences of a notifiable disease outbreak both inside and outside the perimeter were recoverable (assuming they could be separated out at all), the status of the 25 mile requirement, and the parties' intentions as to what could amount to a countervailing cause.

221. In other cases, the causal connector within the peril is 'following' which requires a less stringent causal nexus (Hiscox1-4 hybrid, MSAmlin1-2, RSA3)—see below paragraph 363.

222. But this makes no difference here[176] because on the primary construction of the Court, the disease was a proximate cause of the interruption, and the interruption was a proximate cause of loss (to be quantified).

223. There remains a further stage of quantification under the machinery. This applies a but for test to the insured peril (read in for the words 'the Damage'). Plainly in that situation what is to be read in must include the interruption within the composite peril, although Argenta rather brushes over this point[177]. So when addressing the trends clause and removal of the insured peril for those purposes, the interruption is also plainly removed.

224. There are a few differences amongst the policies in relation to the interruption requirement to be noted:

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[174] Argenta Appeal Case para 47 {B/5/130}.
[175] Argenta Appeal Case paras 42ff {B/5/128}.
[176] RSA seems to accept this at RSA Appeal Case para 40, first sentence {B/9/304}.
[177] Argenta Appeal Case para 30 {B/5/126}.

224.1. Hiscox1-4 hybrid clauses provide that the loss must 'solely and directly' result from interruption. This is explicit in engaging the link between interruption and loss only. So it makes the test stricter than the proximate cause test as between those two elements. See below paragraphs 460ff in relation to this issue and Hiscox Ground 4.

224.2. Argenta, unusually, does not include a provision indemnifying for loss 'resulting from' (or similar) the interruption. It does not specify a causal link between loss and the interruption at all. It just provides an indemnity for the interruption. This most likely imports the default proximate cause test between the loss and the interruption.

225. If, as the Court found, the outbreak was indivisible in that no part of the outbreak could qualify as a rival proximate or but for cause to the insured peril, then that answers all questions regardless of the elements between which a proximate cause test falls to be applied.

The trends clauses/but for test

226. Similarly, the but for test in the trends clauses presents no problem on this construction, because the peril is to be read for these purposes as the entire indivisible outbreak resulting in interruption (see Judgment [122]).

227. These points simply follow from the construction argument, and the insurers' dispute is with that argument—the insurers contending that the interruption must result from the outbreak to the extent only that it fell within the relevant perimeter, and that the peril to be stripped out is only that part of the outbreak and not the broader outbreak.

Postscript: Timing

228. QBE argues that the effect of the Court below's interpretation is that cover is triggered when one case becomes manifest in the policy area even where the relevant interference incurred by the policyholder has already occurred and is continuing as a result of a government response aimed at inhibiting the spread of the disease nationally.[178] This raises several distinct points. First, insofar as a policyholder has suffered some interruption or interference before all the elements of the insured peril have been triggered, this is the Pre-Trigger Peril Point which is addressed in the FCA's Appeal Case Ground 1. Second, if instead the point being made is that the first occurrence of a disease within a policyholder's radius did not take place until after the 21 March or 26 March Regulations, then a different point arises. This is addressed in some detail

[178] QBE Appeal Case para 5 {B/8/257}. See, to similar effect, para 22.

in the FCA's Appeal Case para 54[179] (and noted in Declaration 11.3)[180]—there is a required causal nexus between the interruption and the disease and whether this is satisfied will depend upon whether the interruption was continued in a relevant way after the disease arose within the perimeter. The broad effects of the disease cannot be rival causes, as a matter of construction, but the interruption remains part of the peril for proximate cause purposes and still has some work to do.

229. The interruption attributable to the 21 March or 26 March Regulations will not have been proximately caused by or have followed disease within the radius if there was no case of the disease within the radius until 1 April 2020. However, after the disease had spread into the radius area the FCA would suggest that the continuation of the measures should be treated as resulting from an on-going decision each day (or at least when there was a review of the measures taken) to continue with the measures because of the prevalence of the disease at the date of the review, the disease within the radius would then be part of the indivisible outbreak causing that decision to be made, or a concurrent effective cause of that decision. The Court below was not asked to deal with and did not address this scenario and this Court is not required to deal with it (including given in the overwhelming majority of cases it is expected that a policyholder will be able to prove that the disease in the radius preceded the 21/26 March Regulations) and the FCA only addresses the point in order to deal with QBE's submission.

C. DISEASE CLAUSES: INDIVIDUAL POLICIES

230. This section addresses wording- and insurer-specific points on the disease clauses on appeal in the order in which they were addressed in the Judgment: RSA3, Argenta, MSAmlin1-2, and QBE1.

RSA3

231. RSA3 is an Eaton Gate Commercial Combined policy, a wording underwritten by Eaton Gate as Managing General Underwriter on RSA's behalf. It was taken out by a variety of businesses including building contractors, manufacturers and wholesalers.[181] The policy is divided into 9 sections. Section 2 for Business Interruption begins on page 32,[182] with the main Cover clause for the business interruption consequences of property damage on page 34:[183]

[179] {B/2/48}.
[180] {C/1/7}.
[181] RSA Amended Def para 5(d) {G/19/159}, recorded at Judgment [82].
[182] {C/16/1231}.
[183] {C/16/1233}.

> "In the event of Business Interruption [*viz.* loss resulting from interruption of or interference with the Business carried on by You at the Premises in consequence of loss or destruction of or Damage insured under Section 1 to Property used by You at the Premises for the purpose of the Business] We will pay to You in respect of each item in the Schedule the amount of loss resulting from such interruption or interference [a material damage proviso then follows]"

232. From page 37 onwards,[184] the policy provides a series of Extensions, including Extension vii "*Infectious Diseases*" which (as relevant) provides as follows:

> "Cover provided by this section is extended to include…
>
> We shall indemnify You in respect of interruption or interference with the Business during the Indemnity Period following:
>
> a) any […] (iii) occurrence of a Notifiable Disease within a radius of 25 miles of the Premises"

233. Page 38 then provides the normal definition of a Notifiable Disease and an indemnity period of 3 months.[185] The Court below held that there is an 'occurrence' when there is an infection such that it is diagnosable, and there is no requirement that the disease has to be symptomatic or diagnosed.[186] There is no appeal from that decision.

234. The policy therefore requires proof of (1) loss (2) resulting from interruption or interference (3) following any occurrence of a notifiable disease within a 25-mile radius. For the reasons given above and as rightly found by the Court below at Judgment [93-113], this clause provides cover for loss resulting from interruption or interference following the outbreak of a Notifiable Disease which has come within 25-miles of the premises, from the time of that occurrence.

235. The analysis set out above applies here to its fullest extent. The cover being provided is for existing notifiable diseases, which are ones with the capability to spread and cause pandemics, and for new notifiable diseases which did not yet exist or had not manifested themselves when the policies were issued. Giving cover for the 'inside-only' part of the disease would be illusory because the very nature of those covered diseases, and the likely public authority responses to them, is likely to make it very difficult if not impossible to show that the authority acted because – and only because – of disease within the radius. There is nothing in the wording which requires or suggests that there should only be cover if it could be proven that the part of the outbreak within the radius was the proximate and 'but for' cause of the interruption suffered by the policyholder. The parties would not have intended that cover for a disease which had the potential to become a pandemic would be lost when such a disease actually became a pandemic. This does not involve an "*extreme example*" of a "*rewriting of the parties' bargain*"[187] but is ordinary

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[184] {C/16/1236}.
[185] See the definition of *Maximum Indemnity Period* at the end of sub-clause 4 of the Additional Definition {C/16/1237}.
[186] Judgment [93].
[187] RSA Appeal Case at para 43(c)-(d) {B/9/307}.

contractual interpretation: RSA3 expressly contemplates and covers wide area damage, both in the disease clause and because it provides cover for loss and business interruption caused by damage caused by storms, floods, riots and civil commotion.[188]

236. RSA is wrong to suggest that the word "*occurrence*" should be equated with "*event*" and that this means, *per* Lord Mustill's dictum in *Axa Reinsurance*,[189] the cover is for something happening in a particular time, at a particular place, in a particular way.[190] All the appellant insurers on this appeal appear to agree that the cover in disease clauses is for disease outbreaks, i.e. multiple cases of a disease.[191] It is not clear why a disease within 25-miles is said to fit this definition, but not one which spreads more broadly than that. It is also not clear why this is said to support RSA's case, which accepts that its policies are triggered by 'local lockdowns',[192] which may take place over many weeks and months. Implanting Lord Mustill's dictum does not work because outbreaks of notifiable diseases do not fit his definition. A disease outbreak in Liverpool might last a week, a fortnight or a month, with cases getting more and less severe in different parts of the city during that time, and the outbreak getting larger and smaller varying day by day. RSA would not seriously say to a policyholder within 25-miles of that outbreak that, because the outbreak lasted for month, that meant there was no "*occurrence*" of a notifiable disease (and so there was no cover), although she would have had cover if the outbreak had lasted for a week. See further the consideration of Hiscox's similar argument as to the word 'occurrence' in paragraphs 468ff below.

237. RSA is also wrong to rely on the fact that the other sub-extensions within Extension vii are perils "*whose operation is restricted to the insured premises or to places close to the insured premises*".[193] It is right that all the other insured perils require something to happen at the premises: but the 25-mile relevant insured peril is fundamentally different and is expressly covering a 2,000 square mile area.

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[188] See the Cover at {C/16/1216} "*We agree that if any of the Property Insured described in the Schedule suffers Damage at the Premises by a Defined Peril We will settle claims…*", the Defined Perils including (on that same page) "*riot, civil commotion… storm or flood*". The BI Cover is at {C/16/1233} "*In the event of Business Interruption We will pay to You in respect of each item in the Schedule the amount of loss resulting from such interruption or interference*" with the definition of BI being at {C/16/1231} "*Business Interruption shall mean loss resulting from interruption of or interference with the Business carried on by You at the Premises in consequence of loss or destruction of or Damage insured under Section 1 to Property used by You at the Premises for the purpose of the Business*".

[189] See RSA skeleton Appendix 4 [26] {D/23/1624}, and recorded in Judgment [231].

[190] RSA Appeal Case at para 42(a)-(b) {B/9/305}.

[191] Even RSA seems to accept this, referring in its Appeal Case at para 43 {B/9/306} to "*the occurrence of the disease within the specified radius*", i.e. not referring to individual cases of the disease but the disease when it occurs in the radius.

[192] RSA Appeal Case at paras 53 {B/9/313} and fn 40 in relation to RSA1, although the position is no different for RSA3; and see RSA Trial Skeleton at para 25 {G/14/138}.

[193] RSA Appeal Case at para 42(d) {B/9/306}, and 43(e)(v).

238. The insured peril is a composite one requiring interruption / interference caused by disease.[194] As to RSA's arguments to the contrary (which conflict with its own Defence) see paragraph 218 above.

239. As set out above at paragraphs 200ff, the supposed 'postcode lottery' to which RSA refers is not a product of the FCA's interpretation but an inevitability of having a radius limit.[195] RSA gives an example of a policyholder in Plymouth with cases of COVID-19 in its radius, and one in the Scilly Isles without any cases, and claims this proves an error in the FCA's case.[196] But even on RSA's case, a policyholder 24-miles away from the centre of Plymouth has cover for interruption caused by a disease outbreak occurring there, but not a policyholder 26-miles away, even though both would be subject to the same restrictions as a result of the same outbreak. That is the product of the radius limit, not the FCA's interpretation. It is important at this stage to focus a little more on the Scilly Isles example, which is referred to repeatedly[197] and which insurers seem to regard as their lifeline, as if the events there somehow dictate how the policies should be construed and applied.

240. The point that is made by insurers is that the Scilly Isles did not have any known cases at the time of lockdown, but were still required in effect to close. If, for example, only five or six counties had been affected by COVID-19 then there may well not have been a national and uniform response. There was a national response because of the national outbreak. The Scilly Isles was very much a geographic and (perhaps for that reason) a disease outlier as compared to the rest of the country. That does not disprove the general construction and causation analysis as adopted by the Court and explained in this Case. Nor does it show (as QBE suggests at paragraph 97.3 of its Appeal Case) that one can say with confidence that without disease in the policy area there would still have been a complete lockdown, as in the Scilly Isles, and so it is easy to show that the loss was not at the time caused by the disease in the area. All this means is that there were no cases of the disease in the Scilly Isles that could have been an effective cause of the Government action. This Court must also not lose sight of the fact that the Scilly Isles example is not being used to justify the absence of cover for policyholders in the Scilly Isles due to the absence of policy trigger but rather as the foundation for denying cover to everyone in the whole country. The reality is that insurers are clutching at straws.

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[194] RSA Appeal Case at para 36-40 {B/9/303}.
[195] RSA Appeal Case para 43(e) and fn 21 {B/9/307}.
[196] RSA Appeal Case fn 21 {B/9/307}.
[197] MSAmlin Appeal Case para 41 {B/7/220}, 97.3; RSA Appeal Case fn 21 {B/9/307} and para 70(a).

241. The appropriate causal link requires interruption or interference with the business to be "*following*" any occurrence of a notifiable disease within 25 miles. RSA accepts that the Court below decided that it makes no difference whether this clause requires proximate causation or something less.[198] The word "*following*" is quite clearly a loose form of causal connection and there is no reason why it should entail proximate causation.[199] As explained in paragraphs 210ff above, it is not a link between the insured peril and the loss, but between two parts of the insured peril. Moreover, diseases by their nature do not cause interruption directly, but instead do so because of their effect on authorities and the public. To claim that the proximate cause of a business closed after a SARS outbreak was actually the reaction of authorities, and not SARS, would render this cover entirely illusory. This does not, as RSA suggests, make "*the error of conflating proximate causation with the causative event which was the last event in the causal chain*":[200] if it were otherwise, the cover would almost never apply.

242. The two textual points and two authorities on which RSA relies do not meet this central problem. RSA first relies on the fact that the Indemnity Period in Additional Definition 2 is said to be "*the period during which the results of the Business shall be affected in consequence of the occurrence, discovery or accident*", and says that the authority of *Ionides v Universal Marine Insurance Co* (1863) 143 ER 445 at 455-456[201] shows that the words "*in consequence of*" mean proximate cause.[202] The Court below rightly dismissed this argument at Judgment [96]. All the phrase "*in consequence of*" is doing is referring to the same causal connection as "*following*"; and because the disease would not directly cause interruption or interference with the business (but only do so indirectly, through the actions of others), the phrase must embrace indirect causation (at its highest). The *Ionides* case is about an exception in an insurance policy which removed cover if the loss was due to "*all consequences of hostilities*". The decision was about the connection between the loss and the insured peril, and has no relevance to the meaning of the word "*following*" in a different clause in a different contract.

243. RSA's second textual argument relies on Additional Definition 4 which says that RSA is only "*liable for the loss arising at those Premises which are directly affected by the occurrence discovery or accident*", and it relies on *PMB Australia Limited v MMI General Insurance Limited* [2002] QCA 361[203] to suggest that the world "*directly*" imports proximate causation.[204] The Court below again rightly

198 RSA Appeal Case 44(b) {B/9/309}, and Judgment [111].
199 See paragraph 363 below.
200 RSA Appeal Case para 46 {B/9/309}.
201 {E/20/466}.
202 RSA Appeal Case para 47(b) {B/9/309}.
203 {E/33/947}.
204 RSA Appeal Case para 47(c) {B/9/310}.

dismissed this argument at Judgment [97]. Additional Definition 4 is dealing with a policyholder which has multiple insured premises: this is apparent from the plural in the words "*those Premises*". The aim of Additional Definition 4 is to make clear that where there is (*e.g.*) food poisoning at premises A, leading the authority to shut down premises A and B, there is no cover for premises B. The aim of the clause is not to narrow the cover in the insuring clause, but just to address a multiple premises situation. The *PMB Australia* case concerned the meaning of cover for "*loss directly resulting from*" various perils.[205] Again, the decision was about the connection between the loss and the insured peril (the standard proximate causation link), and does not assist on what the word "*following*" means, especially when placed between the interruption / interference and the disease.

244. RSA does not make any separate arguments based on its trends clause (merely arguing that the trends clause "*reflects the position which would otherwise apply as a matter of law*")[206] so no more needs to be said about it.

Argenta

245. The Argenta wordings are the HIUA Guest House and B&B Insurance policy and the HIUA Holiday Home and Self-Catering Accommodation policy. The BI sections of these policies are materially identical and the former has been selected as the lead wording. Unsurprisingly, all of Argenta's policyholders are Category 6 businesses.

246. The Argenta policy is divided into sections in the usual way. The BI insurance section starts on page 55.[207] The primary insuring clause is found on page 56:

> "If the BUSINESS at the PREMISES is interrupted as a result of the PREMISES being made uninhabitable by any DAMAGE insurable under the Buildings Insurance Section or the Contents Insurance Section the COMPANY will indemnify the INSURED for the amount of loss as stated in the Basis of Settlement but not exceeding the Sums Insured and Limits of Liability stated in the Schedule [material damage proviso then follows]"

247. The Basis of Settlement clause on page 59 provides that Argenta "*will pay as indemnity the amount of the loss sustained by the INSURED as follows*", with three different bases of settlement provided. The notifiable human disease clause is the fourth Extension to the BI cover and is on page 58. Taken together with the stem (on page 57), it reads:

> "The COMPANY will also indemnify the INSURED as provided in The Insurance of this Section for such interruption as a result of

[205] The clause is at judgment para 7 {E/33/950}.
[206] RSA Appeal Case para 64 {B/9/316}.
[207] {C/5/314}.

4. Defective Sanitation NOTIFIABLE HUMAN DISEASE Murder or Suicide

(d) any occurrence of a NOTFIABLE HUMAN DISEASE within a radius of 25 miles of the PREMISES"

248. The right-hand column of the policy provides a series of "*SECTION EXCLUSIONS*", as follows:[208]

"**SECTION EXCLUSIONS**

These apply in addition to the other Exclusions in this Section and the General Exclusions

The COMPANY will not be liable for

(i) for any amount in excess of £25,000

(ii) for any costs incurred in the cleaning repair replacement recall or checking of the property

(iii) for any loss arising from those PREMISES that are not directly affected by the occurrence discovery or accident"

249. There is therefore a £25,000 sub-limit.

250. It was common ground below and remains common ground in the Supreme Court that there is an "occurrence" of a disease provided there is a person who has contracted the disease such that it is diagnosable, whether or not it has been verified by medical testing and whether or not it is symptomatic.[209] The parties therefore intended that interruption caused by public authority response to undiagnosed and asymptomatic cases would be covered by the clause.

251. Many points raised by Argenta have been addressed elsewhere[210] and this section only covers additional points.

252. Much of Argenta's Written Case claims that the Court below 'abandoned' the requirement of proximate causation.[211] It argues that there should be a 'but for' test applied to the question of whether interruption resulted from the disease, and the peril that must have caused the loss is the disease within 25 miles not the disease generally. In other words, it takes the same general approach dealt with above and below in relation to the primary (construction) and alternative (Concurrent Causes) arguments on disease.

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[208] {C/5/315}.
[209] Judgment [158].
[210] Argenta Written Case on the 'arbitrary precondition' argument (para 62) {B/5/134}, the fact that the clause does not say that cover is only for the consequences of the disease in the radius (paras 64-67), the nature of notifiable diseases (paras 68-71), the effect of the Court's conclusion on 'at the premises' clauses (para 74(3)); QBE's Written Case paras 75-88 {B/8/277}.
[211] Argenta Written Case at length at paras 32-74 {B/5/126}.

253. Despite the way it presents its arguments, Argenta does not, for example, put forward a rival proximate cause to the disease, or even to the disease within 25 miles. Its case is all about 'but for'.

254. Argenta relies on the fact that the other parts of extension 4 are confined to loss caused by events occurring at the insured premises.[212] While accurate, the fundamentally different nature of the 25-mile disease clause means that they provide little assistance in determining the scope of that clause. Argenta's policy was clearly providing cover for events occurring far away from the premises: there is a 25-mile pollution and oil spillage cover in Extension 5, and the damage section also provides cover for damage caused by riot and civil commotion (clause 7), storm (clause 9) and flood (clause 10), all of which are events which could impact large numbers of policyholders over a wider area.

255. Argenta then speculates by giving examples of cases in which its policy might still respond to a pandemic, apparently to show that its policy still provides some valuable pandemic coverage (rightly implicitly accepting that this would be expected of notifiable disease cover, contrary to its own case to the contrary elsewhere[213]).[214] But the cases in which Argenta says there may be cover are so caveated that they are illusory, and bear no resemblance to the actual circumstances in which a claim will be made. They assume the parties would have intended that a policyholder could only recover for losses if it could prove the precise motivations of its accommodation customers when cancelling their bookings – and that the parties intended that if a policyholder cancelled their holiday due to the part of the COVID-19 outbreak near the premises then that should be covered, but if they cancelled their holiday due to the same outbreak nationally (including the outbreak inside and outside the policy radius), then there should not be cover. Argenta does not propose a method by which it expects this could actually be done – this is demonstrated by a sample declinature letter it sent to a policyholder in which it asked: "*Could you please advise whether you believe you are in a position to evidence any loss occurring from the localised case only, and if so let me know how*…".[215] Even in the Leicester 'local lockdown' scenario, Argenta would reduce any indemnity claimed by the policyholder by reference to what the lockdown measures would have been without the local spike in cases.[216] In reality, this cover is non-existent and unworkable.

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[212] Argenta Written Case para 58 {B/5/133}.
[213] Argenta Written Case para 59 {B/5/133}.
[214] Argenta Written Case paras 19-21 {B/5/122}.
[215] See the declinature letter extracted in the FCA's Particulars of Claim at pages 64-65 {G/130/2374}.
[216] Argenta Written Case para 21 {B/5/123}.

256. Argenta does not offer any justification for its claim that in the event of a pandemic, the "*most likely*" public authority response would be to take local measures rather than national measures[217] (and the Court was right to find that national measures are well within the parties' contemplation for a notifiable disease—see above paragraphs 153ff.) Nor does it offer any justification (because there is none) as to why the parties should have provided cover for a pandemic disease if the Government reacted to the pandemic in one way but not if it acted to the same disease in a different way. It is no answer to say that this is the effect of the 25-mile clause,[218] which begs the construction question being addressed.

257. The four anomalies identified by the Court are not met by Argenta's Written Case paragraph 73. The first anomaly involves a distinction between a disease outbreak starting 24-miles away, and an outbreak starting 26-miles away (then spreading into the radius), where in both cases the outbreak inside the radius contributes to the authority action: Judgment [105].[219] On Argenta's case, there is only cover for the first outbreak. There is no reason at all why the policyholder should have cover if the outbreak started inside the radius and triggered public authority action before it spread outside, but not if it started outside the radius. This is a different level of arbitrariness from merely specifying that the outbreak must be present within 25 miles, a relevant distinction between remote-only outbreaks and those which come sufficiently near.

258. The second anomaly is that Argenta's case means that there is (theoretically) cover for local lockdowns, but no cover at all for national lockdowns: Judgment [106]. Argenta fails to identify what the supposed "*clear difference in principle*" is between (i) restrictions imposed across the country by local authorities responding to local disease, and (ii) identical restrictions imposed by the government responding to the national disease.[220] In both cases there is a disease outbreak in the policyholder's radius which has resulted in interruption to their business. There is no principled reason at all why the result should be different between the two cases.

259. The third anomaly is that the policyholder has no cover if the Government acts nationally and quickly, to disease across the country and thereby keeping the local prevalence of the disease under control; but the policyholder does have cover if the Government fails to act quickly (or at all), necessitating local authority response to much higher local prevalence (or even not acting and therefore the business being affected by public fear and restraint): Judgment [162]. In both

[217] Argenta Written Case para 69 {B/5/136}.
[218] Argenta Written Case para 71 {B/5/137}.
[219] Argenta Written Case para 73(1) {B/5/137} suggests that in the Court's second example the outbreak is only outside the radius. Self-evidently there is no cover if there is no disease inside the radius, and the Court below would not have suggested that there would have been.
[220] Argenta Written Case para 73(2) {B/5/138}.

cases there is an outbreak of the same disease in the policy radius. Argenta says that it is not anomalous to say that loss cannot be recovered for a national lockdown[221] but gives no explanation at all as to why the parties would have intended different results in these two situations. The obvious question recurs: why does the national lockdown let the insurer off the hook? Why would reasonable people reading the policy words understand that it would?

260. The fourth anomaly is that while Argenta accepts that there is cover (in theory) for 'local' lockdowns, it denies that there should be cover for regional lockdowns (*e.g.* one covering the West Midlands). Argenta claims this is not anomalous because this is "*simply the result of applying the 25-mile limit*" – but that just begs the question as to <u>why</u> the limit should be applied in that way if it produces such anomalous results.

261. Argenta's responses to these (unanswered) anomalies are to pose fantastical examples of policyholders seeking to recover losses based on COVID-19-infected people driving near to or flying over their premises.[222] These examples are simply not of relevance to this case because in assessing whether the whole country was affected by the pandemic the Government was looking at the actual progress of the pandemic, based on reported cases and deaths, and on estimates based on those (outlined at paragraph 325 below). There is no suggestion that they were looking at who had driven through where, let alone of infected people in aeroplanes flying over (and not into) the UK. These examples really raise a different question, which is whether an isolated person transiently passing through the policyholder's radius amounts to an "occurrence" of the disease within the clause, and whether such transient passage was sufficient to have any causative effect on authority action. That question arises on insurers' interpretation as much as it does on the FCA's case. It is easy to envisage cases in which someone driving through an area could lead to action: if an individual, later discovered to be the carrier of a dangerous disease, stopped to refuel or have refreshment on his journey it is readily foreseeable that measures might be taken to premises along his route.

262. Argenta next rails at the fact that there could be cover if it was not known at the time that there was any occurrence of the disease within 25-miles of the insured premises.[223] But it is common ground that interruption caused by a public authority responding to undiagnosed and asymptomatic cases triggers this clause: Judgment [158]. These cases are part of the outbreak to

[221] Argenta Written Case para 73(3) {B/5/138}.
[222] Argenta Written Case para 74(1) {B/5/140}.
[223] Argenta Written Case para 74(2) {B/5/140}.

which the authority is responding. And 'after the event' evidence (e.g. as to the cause of subsidence, a fire or a flood) is common in BI cases to prove both trigger and loss.

263. Argenta's next examples relate to the 'at the premises' clause and the effect of different radius limits, which have both been addressed above.[224]

264. Argenta suggests on more than one occasion that the Court below decided that the counterfactual subtracts COVID-19 in England but should retain the global pandemic outside England.[225] This was a matter which received no attention at trial, but which was expressly raised and dealt with at the consequentials hearing. Mr Edelman QC asked "*whether the court intended to say that: well, for the purposes of the counterfactual […] you don't take into account national COVID, but you can take into account, for example, global COVID pandemic, international travellers not coming, and so on*". Flaux LJ made clear that: "*The issue as to what the position was internationally, and any impact that had, was not something that was actually – so far as I can recollect, was ever addressed as part of the argument by anybody*".[226] This issue does not arise on this appeal and is irrelevant.

265. Argenta's points as to whether the insured peril includes interruption are dealt with above at paragraphs 216ff.

266. Argenta's arguments relating to Lord Mustill's dictum in *Axa Reinsurance*[227] have also been addressed. Argenta cannot sustainably argue that its clause implies a level of "*discreteness*" given it concedes that the clause applies to an outbreak (i.e. multiple cases) across nearly 2,000 square miles, likely for a period of weeks if not longer, and even to local measures taken into response to a pandemic,[228] none of which can properly be said to be something happening at a particular time, in a particular place or in a particular way.

267. Lastly Argenta concedes that the trends clause does not affect the answer to the 'but for' question,[229] and so nothing more needs to be said here.

[224] Argenta Written Case para 74(3)-(4) {B/5/140}.
[225] Argenta Written Case paras 74(5) {B/5/141}, 94(5).
[226] Consequential Day1/39-41 {G/30/220}.
[227] Argenta Appeal Case paras 75-88 {B/5/142}, see paragraph 236 above.
[228] Argenta Appeal Case paras 19-20 {B/5/122}.
[229] Argenta Appeal Case para 106 {B/5/151}.

MSAmlin1-2

268. MSAmlin1 is a Commercial Combined policy whose policyholders are in Categories 1-5 and 7. The optional Business Interruption section starts at Section 6 on internal page 58[230] with the relevant Additional Cover clause (provided as standard) providing as follows:[231]

> "We will pay you for:
>
> **6. Notifiable disease, vermin, defective sanitary arrangements, murder and suicide**
>
> Consequential loss as a result of interruption of or interference with the business carried on by you at the premises following:
>
> a) […] iii. any notifiable disease within a radius of twenty five miles of the premises"

269. There was a £100,000 sub-limit.

270. MSAmlin2 is a Retail policy (also issued as a 'Leisure' and 'Office and surgery' policy) whose policyholders were in Categories 1-5 and 7. The automatic Business Interruption section starts at internal page 42[232] with the relevant notifiable disease clause providing as follows:[233]

> "We will pay you for:
>
> **6. Notifiable disease, vermin, defective sanitary arrangements, murder and suicide**
>
> consequential loss following:
>
> a) […] iii. any notifiable disease within a radius of twenty five miles of the premises"

271. Consequential loss is defined as "*Loss resulting from interruption of or interference with the business carried on by you at the premises following damage to property used by you at the premises for the purpose of the business*".[234]

272. It is common ground that there is no requirement the disease be diagnosed or symptomatic, and it is sufficient that a person has a case of the disease whilst being undiagnosed and asymptomatic.[235]

273. These disease clauses are accordingly the simplest forms of such clause to be considered in this claim. They do not use the word "occurrence" unlike other clauses: a policyholder only needs to prove interruption 'following' any COVID-19 within 25 miles of the premises, i.e. loss following the disease being in the radius.

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[230] {C/10/558}.
[231] {C/10/567}.
[232] {C/11/640}.
[233] {C/11/645}.
[234] {C/11/640}.
[235] Judgment [196].

274. As with other insurers, many points have been addressed already,[236] and only new issues are dealt with here. MSAmlin's repeated and incorrect suggestion that the FCA conceded that the Government action would be the same in the absence of any specific cases in 25-mile policy radii has been addressed at paragraph 338 below.[237]

275. MSAmlin seeks to rely on the Court's construction of the AOCA (Action of Competent Authorities) clause in MSAmlin2, but that centred on the meaning of the word "*incident*", the Court below making clear that "*The FCA's entire case on the NDDA clause founders on the requirement for 'an incident'*".[238] It came to a different conclusion on the disease clause because of the many matters set out above which distinguished the two clauses.

276. MSAmlin is wrong to suggest that the Court below omitted the relevant definition of 'notifiable disease' and did not require that the clause apply to "*specific cases of specific illness sustained by specific persons*".[239] The Court quite obviously did not decide that the clause only required "*proof of the presence of COVID-19 in general terms*" (by which MSAmlin seems to mean the free-standing presence of COVID-19 outside individual cases),[240] given the Court expressly said at Judgment [196] that the clause "*would embrace any case <u>where a person has or persons have the disease</u> within the radius*". The point relied on by the Court below was that these clauses do not use the word "*occurrence*", so insurers' arguments that the word "*occurrence*" means "*event*", and their reliance on *Axa Reinsurance*, cannot be waged against MSAmlin's policies (despite being wrong for the reasons explained elsewhere), even though MSAmlin still tries to make this argument:[241] Judgment [196].

277. As for the meaning of the word "*following*", the causal links required between the disease in the radius and the interruption/interference, and the 'but for' test, these have all been addressed above.[242] MSAmlin relies on other causal links in other clauses in MSAmlin1 to say that "following" was used interchangeably with the phrases "resulting from" in MSAmlin1-2, and "in consequence of" in MSAmlin1 only, and therefore required proximate causation.[243] The Court below rightly dismissed these arguments because different causal links in different clauses

[236] MSAmlin Appeal Case paras 24 {B/7/213} (that the clause does not say 'disease provided that' it is in the radius or similar), para 25.1-25.2 (the meaning of the word 'within'), paras 51.1, 73.3 and 76-78 (the FCA's supposed 'concession' about the effect of the individual cases in the radius on the Government action), para 59 and fn 18 (identification of the insured peril), para 97.3 (QBE2-3).
[237] MSAmlin Appeal Case paras 51.1 {B/7/223}, 73.3 and 76-78.
[238] MSAmlin Appeal Case para 25.3 {B/7/214} and Judgment [404].
[239] MSAmlin Appeal Case para 29.3 {B/7/216}, and paras 27-30 more generally.
[240] MSAmlin Appeal Case para 29 {B/7/215}.
[241] MSAmlin Appeal Case para 31 {B/7/216}.
[242] MSAmlin Appeal Case paras 51-71 {B/7/223}.
[243] MSAmlin Appeal Case para 56 {B/7/226}.

provide no reason to interpret 'following' in a different way from its natural meaning: Judgment [194]. The Court's judgment on the meaning of the MSAmlin 1 AOCA clause is similarly irrelevant.[244]

278. The fact that the other covers in Extension 6 apply to matters taking place at the premises does not affect the meaning of the 25-mile disease clause which self-evidently does not require anything to take place at the premises (other than interruption/interference).[245] It is also not the case that the 25-mile disease clauses evidences an intention to restrict the indemnity for pandemic diseases to the effects of the disease within that radius:[246] as explained above, in many cases that would render the cover illusory and so would be giving with one hand whilst simultaneously taking away with the other.

279. MSAmlin's example of a person infected with COVID-19 sailing near an island policyholder duplicates Argenta's examples of persons driving or flying through a policy radius and have been addressed at paragraph 261 above,[247] as has its arguments about the 'at the premises' clause at paragraphs 193ff.[248] MSAmlin's criticism of the fact that the policy can be triggered from an undiagnosed disease is fundamentally inconsistent with the Court's judgment (which is not appealed) that an undiagnosed and asymptomatic disease is entirely within the ambit of the clause: see Judgment [196]. The clause must be contemplating that a policyholder can recover for authority action taken in response to undiagnosed and asymptomatic cases. As set out in paragraph 325 below, these undiagnosed and asymptomatic cases were part of the picture to which the Government was responding.

280. MSAmlin refers to each of the other limbs within the disease clauses as providing cover for events occurring at the insured premises and suggests that this means that "*the entire tenor of the insuring agreement as a whole is, therefore, circumscribed, defined-area cover*".[249] It is also false to claim that "*the entire tenor*" of the policy is "*defined-area cover*":[250] 25-miles is a very wide area, deliberately chosen and contrasting with the 1-mile cover for prevention of access (in Extensions 7 and 8), and this policy also responds to damage caused by storms, floods, riots and civil commotion (see page 82), clearly contemplating wide-area events.

[244] MSAmlin Appeal Case para 57.3 {B/7/227}.
[245] MSAmlin Appeal Case para 32 {B/7/217}.
[246] MSAmlin Appeal Case para 35 {B/7/218}.
[247] MSAmlin Appeal Case para 41 {B/7/220}.
[248] MSAmlin Appeal Case para 42 {B/7/221}.
[249] MSAmlin Appeal Case paras 32.1-32.2 {B/7/217}.
[250] MSAmlin Appeal Case para 32.2 {B/7/217}.

QBE1

281. QBE1 is a Business Combined Insurance Policy. QBEs policyholders are within Categories 1-5 and 7. The policy is divided into several sections, including in Section 7 a "Business interruption section". Clause 7.1.1 at page 27 provides the primary damage BI clause.[251] Clause 7.3 provides various "*Extensions applicable to this section*" including clause 7.3.9 which (together with the stem on page 29)[252] provides cover as follows:

> "**Extensions applicable to this section**
>
> This section is extended to include the following additional coverages […]
>
> We will indemnify you for:
>
> **7.3.9 Murder, suicide or disease**
>
> interruption of or interference with the business arising from:
>
> a) any human infectious or human contagious disease (excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition) an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the premises or within a twenty five (25) mile radius of it;"

282. There is a 3-month sublimit at the end of clause 7.3.9.[253]

283. The High Court sensibly simplified the clause by shortening its opening words so that it provides: 'interruption of or interference with the business arising from any notifiable human infectious or contagious disease manifested by any person whilst in the premises or within a 25 mile radius of it'. The Court below also held that "manifested" requires proof of a diagnosed or symptomatic case, and that finding is not appealed.[254]

284. QBE makes many of the same arguments as other insurers which have been addressed above (*e.g.* 'postcode lottery',[255] identifying the insured peril,[256] the dictum in *Axa Reinsurance*,[257] the indivisible cause,[258] and the counterfactual[259]). Only new points are addressed here.

285. QBE argues, in common with other insurers, that the other extensions within clause 7.3.9 itself "*focus on events occurring at or within a specified distance of the insured premises*" and are all "*providing cover for events or for the harmful consequences of events which have occurred at the insured premises*".[260] Under the

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[251] {C/12/741}.
[252] {C/12/743}.
[253] {C/12/745}.
[254] Judgment [224].
[255] QBE Appeal Case paras 46-47 and 51-53 {B/8/268}.
[256] QBE Appeal Case paras 59-66 {B/8/272}.
[257] QBE Appeal Case para 77 {B/8/277}.
[258] QBE Appeal Case paras 79-85 {B/8/278}.
[259] QBE Appeal Case paras 109-112 {B/8/284}.
[260] QBE Appeal Case at paras 2 {B/8/257}, 15, and at length at paras 40-42.

heading of the "*contractual landscape*", QBE also seeks to re-run an argument (rejected below) that divides its BI covers as a whole into two groups – damage extensions and non-damage extensions – and that the latter are all 'insured premises-related', which is said to show that the disease clause covers "*events occurring at or within a specific distance of the insured premises*".[261]

286. The other covers within clause 7.3.9 do indeed all require something to occur at the premises, but they do not assist very much in interpreting what the 25-mile clause means, because that expressly and unequivocally does not require anything to occur at the premises. It is providing cover for a disease occurring over an area a quarter of the size of Wales. The extension trigger is *related* to the insured premises in that the disease must occur within 25 miles of it, and affect the business operated at the premises, but that is not disputed: that fact alone cannot imply that the disease must only *occur* within 25 miles.

287. QBE's 'nearness' approach in clause 7.3.9 is also inconsistent with QBE's own position that the "*most likely*" cause of BI loss caused by a notifiable disease is "*civil, government and/or military action*".[262] It is not at all clear why if the most likely cause of loss is action taken by the government or the military, the parties should have intended that there would be only cover if the government or military acted locally, but not if they acted nationally.

288. As for the other Extensions, the scheme which QBE seeks to erect is artificial, quite plainly reverse-engineered, and does not assist the interpretation of the disease clause. The reality is that each extension defines its own nexus, with requirements including: (i) physical damage to the premises,[263] (ii) physical damage with a vicinity limit,[264] (iii) physical damage to property or premises anywhere in the country/EEA/world;[265] (iv) non-damage cover at the premises,[266] (v) non-damage cover with a vicinity limit,[267] (vi) the disease 25 mile clause, and (vii) non-damage cover with no vicinity limit but with a different nexus to the premises.[268] Each nexus is specific to the particular cover, and there is no 'scheme' as QBE contends from which to infer some intention regarding the scope of the disease clause.

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[261] QBE Appeal Case para 2 {B/8/257}.
[262] QBE Appeal Case at para 58 {B/8/272}, emphasis added.
[263] Extensions 7.3.1 'Additional increased cost of working' {C/12/743} and 7.3.12 'Research and development'.
[264] Extensions 7.3.4 'Denial of Access' and 7.3.7 'Loss of attraction' {C/12/744}.
[265] Extensions 7.3.2 'Contract sites and transit' {C/12/743}, 7.3.3 ' Customers and suppliers premises', 7.3.6 'Exhibitions', 7.3.10 'Patterns', 7.3.11 'Property stored' and 7.3.13 'Utilities supply'.
[266] Much of extension 7.3.9 'Murder, suicide or disease', including (a) - disease at the premises {C/12/745}.
[267] Extension 7.3.5 'Denial of access (non-damage') {C/12/744}.
[268] Extensions 7.3.8 'Lottery winners increased costs' {C/12/745} and injury or illness traceable to food or drink provided in the premises in 7.3.9(c).

289. QBE is wrong to claim that there is cover on the High Court and FCA's approach when one case becomes manifest in the policy area even where the relevant interference has already occurred.[269] There are two answers to it: the temporal point (i.e. that the interruption/interference must temporally follow the interruption, so if there is no 'new' interruption then there is no cover—see paragraphs 228ff above), and the Pre-Trigger Peril Point (addressed in the FCA's Ground 1 of its appeal).

290. The FCA's construction cannot be criticised because it may require proof using 'after the event' evidence, something which is surprising to hear QBE describing as "*highly unorthodox*" and to be contrasted with "*the usual type of proof*" in a BI claim.[270] QBE itself claims that assessing loss in BI claims "*is both challenging and complex*",[271] and does not explain why proof of trigger should not also be so. Using *ex post facto* expert evidence to establish trigger is in fact entirely orthodox: in *Contact (Print and Packaging) Ltd v Travelers Insurance Co Ltd* [2018] EWHC 83 (TCC)[272] the Court had to decide whether damage to a printing press was caused by subsidence, and heard from 8 expert witnesses including printing press experts, structural engineering experts and metallurgist experts. All of this evidence was 'after the event'.

291. Thus while some events or causes of BI loss may be clear or evident, others will not be. QBE1 insurers against all-risks property damage (clause 4.1) save for damage caused by (among other things) aircraft travelling at supersonic speeds (clause 12.1), defect design (clause 12.3), non-specific loss or damage (clause 12.13), subsidence unless caused by *e.g.* the escape of water from an apparatus (clause 12.17), or a change in the water table level (clause 12.20). All these matters could easily require 'after the event' statistical evidence – just like the disease clause.

292. That is, of course, to be distinguished from the impossible probative tasks set by the insurers' construction as to what measures would have been taken by what public authorities, and what customers would have done, with no disease within the perimeter.

293. QBE argues in several places that the Supreme Court should not uphold the Court below's interpretation because its effect would be to expose QBE to huge losses.[273] This has been addressed at paragraphs 196ff above but the short answer is that (i) any such exposure (whatever it might be – this Court having no evidence on it) cannot affect the interpretation of the policy; (ii) the exposure is inherent in the fact that the policies respond to pandemic diseases, which

[269] QBE Appeal Case paras 5 {B/8/257}, 22.
[270] QBE Appeal Case paras 48-49 {B/8/269}.
[271] QBE Appeal Case para 101 {B/8/282}.
[272] {G/50/450}.
[273] QBE Appeal Case paras 20 {B/8/261}, 44, 52, 56.

even QBE admits (as it concedes there would be cover nationwide had the lockdowns followed a 'local' rather than 'national' pattern, i.e. it would have been exposed had the restrictions had been slightly different);[274] and (iii) the policy provides cover for wide area damage, including damage caused by floods, storms, riot and civil commotion.[275] By clause 7.4.3 QBE excludes loss due to acts of civil, governmental or military authority if they are caused by certain events, but those events do not include disease.[276] There is therefore an obvious contemplation of civil, governmental or military response to diseases which will cause the required interruption or interference with the policyholder. In reality, this is special pleading that the cover extends to something more expensive than the insurer expected would ever happen, which is not a construction argument.

294. As for the causal links, these are as before: the requirement of proximate cause applies at the stage between the loss and the insured peril in the usual way. The High Court can be forgiven for not directly addressing the precise words in the policy requiring that link in Judgment [224-229], despite the point being argued.[277] The requirement for proximate cause arises from the words "*resulting from*", those being the words linking the loss and interruption/interference in Extensions 7.3.2, 7.3.3. 7.3.4, 7.3.5, 7.3.6, 7.3.10, 7.3.11 and 7.3.13 and inadvertently omitted from Exclusion 7.3.9.[278]

295. QBE argues not just that the counterfactual should retain cases outside the radius, but also "*any cases of COVID-19 within the relevant policy area which had no causative potency / did not form part of the insured peril*".[279] This has several problems. First is that QBE itself concedes that its clause is providing cover for a local outbreak and not merely a single local case.[280] Second, it is not clear what QBE means by cases existing within the area but having "*no causative potency*" or how a policyholder or the insurer is supposed to be able to identify them. If cases did not have any causative potency then presumably they would not have done so on the counterfactual either. In any case, it would obviously be contrary to the parties' intentions for QBE to be able to say that a policyholder's interruption was caused by 100 cases, but if there had only been 20 cases then the policyholder would still have suffered some lesser interruption, and accordingly their

[274] QBE Appeal Case para 17 {B/8/260}.
[275] See the all risks cover at clause 4.1 {C/12/724}, and the need to notify damage caused by riot within 7 days in clause 3.2.
[276] See {C/12/747}.
[277] See, most clearly, HIGA's Trial Skeleton at para 142 {G/10/103}.
[278] See {C/12/743}. The other possibility is that the link is "*caused by*", that being the link used in the primary cover clause and also in clause 7.4.3, but the two links would have the same meaning in this policy, as is apparent from their combined use in clause 7.4.1 "*interruption of or interference with your business caused by or resulting from damage*…".
[279] QBE Appeal Case para 110 {B/8/284}.
[280] QBE Appeal Case para 17-18 {B/8/260}, in particular.

cover is only for the 'additional' interruption caused by the 80 cases and not the 100 cases. That would not be providing cover for the local outbreak at all.

296. As for the argument that this Court should apply to QBE1 the same approach as the Court below took to QBE2-3,[281] this is addressed in the FCA's Appeal Case Ground 4, paragraphs 126-152.[282]

297. QBE finally says that the trends clause "*makes explicit what would be the test under common law*"[283] and it does not take any freestanding points to suggest that its own trends clause changes the 'but for' test addressed elsewhere.

RSA1 (hybrid)

298. RSA1 is a "*Cottagesure*" policy which is primarily directed at holiday cottage owners (Category 6 businesses). The relevant extension is on page 16 of the policy and provides:[284]

> "THIS INSURANCE ALSO COVERS
>
> **2. Disease, Murder, Suicide, Vermin and Pests**
>
> Loss as a result of
>
> A) closure or restrictions placed on the Premises as a result of a notifiable human disease manifesting itself at the Premises or within a radius of 25 miles of the Premises."

299. In the parallel column there are sub-limits of £250,000 and a 12-month indemnity period. There is no separate requirement for interruption or interference in this clause – provided the closure or restrictions result in loss, the claim is within the scope of cover.[285]

300. The Court below decided that the phrase "*manifesting itself*" would be satisfied by a person diagnosed with, or displaying symptoms of, a notifiable disease, and there is no appeal on that point.[286] The meaning of the words "*closure or restrictions placed on the Premises*" are the subject of the FCA's Ground 2: see the FCA's Appeal Case paras 85-93.[287] The 'composite peril' aspects to this clause are addressed in paragraphs 423ff below. This section just deals with the disease aspects of the clause.

301. The interpretation of the 25-mile radius clause has been addressed above at length and is not repeated here. One can easily imagine a policyholder whose holiday accommodation premises

[281] QBE Appeal Case paras 91-98 {B/8/280}.
[282] {B/2/69}.
[283] QBE Appeal Case para 103 {B/8/283}.
[284] {C/15/1129}.
[285] RSA did not argue below or on this appeal that such a requirement should be implied.
[286] Judgment [295].
[287] {B/2/60}.

are within 20-miles of a major tourist attraction (say, a theme park), with that tourist attraction being closed down by a disease outbreak, leading to cancelled bookings and loss. That is a good example of why it should not make a difference whether the outbreak leading to that closure was wholly or only partly within the radius, provided at least some part of it was. It is very difficult to understand *why* the parties would have intended a complex exercise to be undergone to work out whether the theme park would have closed if only *some* of the disease outbreak had occurred, and equally difficult to understand how that exercise could sensibly be carried out.

302. RSA makes common points about the nature of other covers being restricted to the insured premises or to places close to the premises.[288] This is not entirely correct since there is cover for pollution of any beach within a 10-mile radius of the premises, which is hardly particularly close.[289] But it does not much matter, because the 25-mile disease clause is sufficiently different in its nature to these other covers to make any comparisons or cross-fertilisations inapt. RSA's 'postcode lottery' argument has been addressed at paragraphs 200ff above.[290] Its argument that the policy should be construed in such a way as to avoid a conclusion which exposes RSA to highly correlated losses has also been addressed: see paragraphs 196ff above.[291]

303. As for the causal links, the requirement is that the closure or restrictions placed on the premises must be "*as a result of*" a disease manifesting itself within 25-miles. As the Court below found at Judgment [296], the link is expressed in terms of "*whether the disease has shown or manifested itself close to the premises. Individual cases within the area are therefore treated as the demonstration of the presence of the disease at or relatively near the premises, rather than being focused on as being, in themselves, the cause of the closure or restrictions*". This is the correct interpretation for all the reasons given above.

304. As for causation and 'but for' more broadly, RSA does not make any points which have not been addressed elsewhere.

Hiscox4 (hybrid)

305. Hiscox4 is a retail policy. Four policies were before the Court below, one 'lead' and three 'non-lead' wordings, each with differing proportions of policyholders by business category.[292] The policyholders insured on the lead wording were almost entirely in Categories 1-4, with 42%

[288] RSA Appeal Case para 49(c) {B/9/311}.
[289] See Extension to Cover at {C/15/1130}.
[290] RSA Appeal Case para 52(e) {B/9/313}.
[291] RSA Appeal Case para 52(d) {B/9/312}.
[292] See the "Table of Categories of Business by Policy" {C/46/1953}.

being in Category 4 and 29% in Category 2.[293] The three non-lead wordings were issued entirely or almost entirely to a single category of business: Category 1,[294] 2[295] or 4[296] respectively. Category 5 businesses make up just 0-3% of the policyholders. The relevant Categories of business for Hiscox4 are therefore Categories 1, 2 and 4.

306. The relevant clause provides as follows:[297]

> "We will insure you for your financial losses and any other items specified in the schedule, resulting solely and directly from an interruption to your business caused by:
>
> Public authority
>
> 7. your inability to use the business premises due to restrictions imposed by a public authority during the period of insurance following […]
>
> b. an occurrence of a notifiable human disease within one mile of the business premises"

307. Hiscox's Ground 5 concerns the meaning of the words "*restrictions imposed… following… an occurrence of a notifiable human disease within one mile of the business premises*" in Hiscox4. This is the same argument advanced by other insurers in relation to causation and disease clauses: what is the nature and effect of the one-mile limitation, and in particular is it, as insurers contend, only the disease within that area that must have the required causative effect, with the effect of disease outside the area either preventing the disease within the area from being a 'but for' cause of any interruption of or interference with the business or being element that is deployed in a counterfactual under a trends clause?

308. The Court below held at Judgment [273] that this clause was to be interpreted in the same way as the majority of the other disease clauses, *viz.* that the required causal link was between the restrictions and a disease which had occurred within a one mile radius, rather than between the restrictions and the specifically local instances of the disease. This was correct.

309. The general points made above as to perimeter clauses and as to QBE2 and especially QBE3 (another 1 mile clause—see FCA Appeal Case, Section D) are repeated here.

310. In this section only Hiscox's particular textual and other points unique to the Hiscox4 wording are addressed.

311. The first factor relied on by Hiscox is that there has to be an 'occurrence' of the notifiable disease within 1 mile.[298] As set out below in relation to Hiscox1-3 (which requires an occurrence

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[293] Cat 4: 42%, Cat 2: 29%, Cat 3: 13%, Cat 1: 12%, Cat 5 3%.
[294] The proportions for this policy were: Cat 1: 94%, Cat 6: 6%.
[295] The proportions for this policy were 100% Cat 2.
[296] The proportions for this policy were: Cat 4: 97%, Cat 1: 3%, Cat 5: 1% or less.
[297] {C/9/498}.
[298] Hiscox Appeal Case para 113-5 {B/6/185}.

of a notifiable disease without a vicinity limit), 'occurrence' is a very neutral term that means a happening, and here encompasses an outbreak of COVID-19. The word 'occurrence' does not of itself restrict the size or location of that outbreak. This reflects Argenta's approach, which is to accept that 'occurrence' simply means happening of the outbreak, and that a wide outbreak 'occurs' wherever it is, including more than 25 miles away from the premises.[299] Hiscox[300] seeks to gain some support from Judgment [196] but that is misplaced. The fact that the word 'occurrence' was not used in the MSAmlin disease clauses simply meant that the Court found it 'relatively straightforward' to reach its conclusion about the MSAmlin clauses. It did not mean that the word 'occurrence' would have resulted in a different conclusion, as evidenced by the fact that the Court concluded that the word did not result in a different conclusion in relation to the Hiscox policies (Judgment at [271]). It just meant that the Court did not have to engage in such an analysis.

312. This also reflects the nature of the notifiable disease, as explained at paragraphs 134ff above. Some notifiable diseases *may* be localised or confined, as Hiscox says, coming up with the example of a justice of the peace imposing restrictions following a notifiable disease[301], and, as the Court commented at Judgment [271], such cases may be the more typical but this is a specialised peril addressing the 31 (plus added other) human diseases which include those for which there is a risk of a pandemic or epidemic, hence the requirement to notify. If Hiscox was only interested in local-only diseases and local action then why cover specifically *notifiable* diseases (for which the unique identifying characteristic is their possibility of spreading broadly) and not disease generally, why extend to public authorities rather than local authorities (identifying some local officials who may act in these perils[302] does not explain why the parties extended cover to public authorities more broadly and did not exclude national level action as they did for the 'Cancellation and abandonment' cover), and why not say that broader outbreaks are excluded either expressly or by the simple expedient of inserting the word "only" before "within one mile" (which is in reality how Hiscox is inviting this Court to rewrite the clause)?

313. Hiscox also relies on a *noscitur a sociis* argument, that the other sub-clauses have a "*local flavour*".[303] The FCA's points on the identical argument in relation to Hiscox1-3 are dealt with below at paragraphs 479ff. Murder or suicide need not be near the premises, and many of the non-damage extensions outside the public authority clause have no locality requirement, but more

[299] E.g. Argenta Appeal Case para 15. Hiscox's argument that 'occurrence' should be contrasted with 'danger' or 'emergency' (Hiscox Appeal Case para 114) is not understood but also impermissible—those are terms in other wordings.
[300] Hiscox Appeal Case para 115 {B/6/185}.
[301] Hiscox Appeal Case para 107 and 112.2 {B/6/184}.
[302] Hiscox Appeal Case para 112 {B/6/184}.
[303] Hiscox Appeal Case para 108-112 {B/6/183}.

than that, this argument does not work because the occurrence of a notifiable disease within one mile of the premises does indisputably require locality. What the *noscitur* principle cannot do is assist as to whether that element restricts cover to the effects only of the disease within 1 mile, accepting at all times that there is no cover unless the disease extended within 1 mile.

314. The significance or otherwise of the clause being only 1 mile is considered above.

315. Hiscox does not challenge the Court's findings as to the meaning of 'following', which is discussed below at paragraph 363 and is agreed with Hiscox to require that something is both later and has some causal connection with the prior thing, albeit a looser connection than proximate cause: Judgment [259].

316. As set out above, once the clause has been construed as intended to cover both the disease inside and the disease outside the perimeter, rather than seeking divide up what is in reality an indivisible outbreak of disease, there is no more difficulty in saying that the public authority actions 'followed' the disease than there is with a clause like Hiscox1-3 which has no perimeter limit at all.

317. It is only on the alternative case, where the disease within 1 mile is found to be divisible and separate from the disease outside 1 mile, that the issue really arises. As set out below in Section E, the action did follow the disease because it was a national response to cases everywhere which were all equally effective causes of the action. Hiscox is wrong to say that the Court misapplied the requirement by requiring it only to be 'temporally posterior'[304]—the Court's reference to that at Judgment [273] was in the context of all cases having contributed to the national decision (Judgment [112]) but emphasising that a public authority response *prior* to the disease occurrence would not qualify (see further Judgment [113]). And, as Hiscox notes elsewhere[305], the Court also did acknowledge and satisfy the causative element of the 'following' causal connector.[306] 'Following' is deliberately more relaxed than 'caused by', as much as Hiscox might now prefer that it had used the latter term.[307] The Court's different conclusions on the NDDA clause turn on its (unappealed) conclusions as to the significance of the use of the term 'incident' and other words of that clause and cannot be transposed to this different clause on which the Court rightly reached a different conclusion.[308]

[304] Hiscox Appeal Case para 124 {B/6/188}.
[305] Hiscox Appeal Case para 126 {B/6/188}.
[306] Judgment [273].
[307] Hiscox Appeal Case para 130 {B/6/189}.
[308] Contra Hiscox Appeal Case para 127 {B/6/188}.

D. DISEASE CLAUSES: THE ALTERNATIVE CASE: CONCURRENT CAUSES

318. The FCA's secondary case applies if the Supreme Court rejects its primary case and the conclusion of the Court below that the insured peril in the disease clauses is cover for interruption or interference caused by COVID-19, both inside and outside the relevant policy area, after it has come within the relevant policy area. This fallback case is therefore premised on the assumption that the Court decides that the correct construction of the insured peril requires there to be a causal link between the occurrence of COVID-19 within the relevant policy area and the interruption/interference. It is common ground with [at least some] of the appellant insurers that these causation issues only arise if the Supreme Court upholds their appeals as to the construction of the relevant insured perils.[309]

319. It is in this context that the FCA addresses insurers' argument that the required causal link required between the interruption / interference and the disease within the relevant policy area was not satisfied and therefore the cover was not triggered because (as is not disputed) in March 2020 the Government acted nationally in response to the national outbreak. The FCA will initially deal with this generally, before addressing the causal requirements of the policies individually, because the FCA's case is that it should succeed on this ground even if the cases in the relevant policy area have to be the or a proximate cause of the interruption or interference. One important point needs to be borne in mind, however, and that is that at this stage what is being addressed is satisfaction of the causation requirement in the policy trigger and not quantification under the trends clause.

320. The Court set out its alternative analysis, which viewed each occurrence (or each 50 mile wide circle of occurrences) as a separate but effective cause of the policyholder's loss, at Judgment [533]:

> "The alternative analysis, although we regard it as less satisfactory, is that each of the individual occurrences was a separate but effective cause, so that they were all effective because the authorities acted on a national level, on the basis of the information about all the occurrences of COVID-19. As we have said, it is artificial to say that only some of those occurrences of COVID-19 which had occurred by any given date were effective causes of the action taken at that date; and still more artificial to say that because the action was taken in response to all the cases, it could not be regarded as taken in response to any particular case."

321. As elaborated upon at Judgment [112]:[310]

> "On this analysis they were all effective because the authorities acted on a national level, on the basis of the information about all the occurrences of COVID-19, and it is artificial to say that only some of those which had occurred by any given date were effective causes of the action taken at that date; and still more artificial to say that because the action was taken in response

[309] See RSA's Appeal Case at para 6 {B/9/294}.
[310] In relation to RSA3. See, similarly, Judgment [147] (RSA4), [165] (Argenta), [191] (MSAmlin1-2).

> to all the cases, it could not be regarded as taken in response to any particular cases. As Mr Edelman QC submitted, there is material in the Agreed Facts which provides a sufficient basis for this analysis. He pointed to the information which the government was acting upon, and a number of SAGE minutes, which show that the government response was the reaction to information about all the cases in the country, and that the response was decided to be national because the outbreak was so widespread. As Mr Edelman QC pointed out, the Secretary of State for Health and Social Care, Mr Hancock, on 28 April 2020 stated that thought had been given to imposing measures first on London and the Midlands, but it had been decided that "we are really in this together", and that "the shape of the curve … has been very similar across the whole country". Given this, it appears to us that it is not unrealistic to say that all the cases were equal causes of the imposition of national measures."

322. This alternative case was then adopted elsewhere, e.g. summarised at Judgment [165] "*Or alternatively, that each of the cases of the disease was an independent cause, and they were all equally effective in producing the government response*".[311]

323. This the ***Concurrent Cause*** route.

The facts and evidence

324. There is no appeal by most appellant insurers from the Court's factual findings that the UK government response to COVID-19 was to all the cases in the country, and was a national response because the outbreak was everywhere (see especially Judgment [112], quoted above at paragraph 321). Those findings are, for those insurers, unchallenged. (The exceptions are Argenta and QBE, whose challenges are addressed below.) They were an acceptance of the FCA's 'jigsaw' point.[312]

325. The material that was deployed at trial[313] and underpins that factual conclusion (some of which was referred to in Judgment [112]) is as follows:

    325.1. On 3 March 2020 the Scientific Advisory Group for Emergencies ("**SAGE**") held its twelfth meeting on COVID-19 {D/6/518-521}. Its minutes recorded discussion of "*the impact of potential behavioural and social interventions on the spread of a Covid-19 epidemic in the UK*" and that, at that stage, it considered that there was "*likely to be geographical variation in the timing of localised peaks of the epidemic*" (paras 1 and 8).

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311 See also Judgment [134], [147].

312 See e.g. FCA Trial Skeleton para 241 {D/20/1064}: "*The Government responded to the fear/risk/damager/emergency/prevalence of COVID-19 all around the country and the incidence of the disease. Had there been no such fear/risk/danger/emergency/prevalence anywhere, it would not have acted… All the areas of the country aggregated were concurrent causes, but no single area satisfies the 'but for' test. This is a 'jigsaw' cause that depends upon the totality of the pieces but no single piece is sufficient.*"

313 FCA's trial skeleton para 65 {G/5/14}, the FCA's oral submissions Day3/110 {G/24/183} and Day8/7-17 {G/29/209}, the HIGA oral submissions Day8/179-180 {G/29/218}, the two maps referred to in the FCA's and HIGA's oral closing {C/48/1987} and {C/49/1989}, HIGA written reply submissions in relation to QBE policies paras 2 to 7 and the documents cited there {G/137/2384}, and as recorded in Judgment [112]. See also Zurich's contrary oral submissions at Day7/14-21 {G/131/2376}, which the Court rejected.

325.2. On 5 March 2020 at its thirteenth meeting SAGE concluded that "*the UK remains in the containment phase of the epidemic*" although there was epidemiological and modelling data to support isolation measures, within the next 1-2 weeks, to delay COVID-19's spread {D/6/559-561} (paras 2 and 6). SAGE did, however, note that COVID-19 cases had been identified in individuals in intensive care who had not travelled overseas, which was something "*suggesting sustained community transmission is underway in the UK*" (para 5). The UK's first death from COVID-19 was also announced on 5 March 2020.[314]

325.3. On 10 March 2020 at its fourteenth meeting, the update was now that "*the UK likely has thousands of cases – as many as 5,000 to 10,000 – which are geographically spread nationally*" {D/6/569-573} (para 5). SAGE recorded that transmission was underway in both hospital and community settings (para 6). Modelling at this point suggested that the UK was 10-14 weeks from the epidemic peak if no mitigating strategies were introduced, but because data was fast accruing, firmer infection rate estimates would be available in the next week (paras 7 and 18). SAGE's proposed measures at this point were isolation and social distancing measures to be triggered based on "*cumulative ICU cases[,] tracking and other surveillance data*" (table after para 34). It is self-evident that SAGE was monitoring and reporting on the progression of COVID-19 across the country.

325.4. On 13 March 2020 at its fifteenth meeting, and as data began to build, SAGE recorded that it "*now believes there are more cases in the UK than SAGE previously expected at this point, and we may therefore be further ahead on the epidemic curve*" {D/6/585-589} (para 1). This change in numbers was due to a lag in data being available for modelling, with SAGE noting that ensuring the availability of accurate and complete data with minimal delay was a "*priority*" (paras 5 and 7). SAGE was at this point considering further social distancing interventions "*that may best be applied intermittently, nationally or regionally, and potentially more than once*" (para 3). Again, it is apparent that the response being considered was a national one.

325.5. On 16 March 2020 at its sixteenth meeting, the position changed rapidly. The minutes record the following: {D/6/591-595}

> "1. On the basis of accumulating data, including on NHS critical care capacity, the advice from SAGE has changed regarding the speed of implementation of additional interventions.
>
> 2. SAGE advises that there is clear evidence to support additional social distancing measures be introduced as soon as possible.

[314] {D/6/564}.

3. These additional measures will need to be accompanied by a significant increase in testing and the availability of near real-time data flows to understand their impacts.

4. […].

5. SAGE did not review the work on intermittent application of measures nationally or geographically in detail but will do so.

Situation update

6. London has the greatest proportion of the UK outbreak. It is possible that London has both community and nosocomial transmission (i.e. in hospitals).

7. It is possible that there are 5,000-10,000 new cases per day in the UK (great uncertainty around this estimate).

8. UK cases may be doubling in number every 5-6 days.

9. […]

Behavioural and social interventions

10. […]

11. It is vital to understand numbers of cases regionally relative to NHS capacity, to know where local more stringent interventions might need to be introduced.

12. […].

13. The science suggests additional social distancing measures should be introduced as soon as possible."

325.6. These conclusions were reflected in the Prime Minister's announcement on 16 March 2020 {D/6/612-615} for everyone to stop non-essential social contact and all unnecessary travel, measures which he said were "*based scrupulously on the best scientific evidence*".

325.7. On 18 March at its seventeenth meeting SAGE recorded that there were 1,950 cases in the UK, with 87 cases in intensive care (of which 62 were in London), and that the UK was following the same exponential growth rate of cases as Italy {D/6/671-674} (paras 9-10). The Prime Minister's announcement of 20 March followed shortly afterwards.

325.8. On 23 March 2020 and at its eighteenth meeting SAGE recorded that "*UK case accumulation to date suggests a higher reproduction number that previously anticipated*", with the data suggesting that "*London is 1-2 weeks ahead of the rest of the UK on the epidemic curve*" {D/6/744-748} (paras 1 and 7). A nationally representative ONS survey recorded significant behavioural changes in the UK, with varying compliance levels. The Prime Minister's announcement of 23 March followed shortly afterwards.

325.9. On 28 April 2020 the Secretary of State for Health and Social Care, Matt Hancock MP, was asked whether the approach to lockdown measures (and easing) should be regional or country-wide. He replied (emphasis added): {C/43/1900}

> "There was a big benefit, I think, as we brought in the lockdown measures, of the whole country moving together. We did think about moving with London and the Midlands first, because they were more advanced in terms of the number of cases, but we decided that we are really in this together, and the shape of the curve, if not the height of the curve, has been very similar across the whole country. It went up more in London but it's also come down more, but the broad shape has been similar, which is what you'd expect, given that we've all been living through the same lockdown measures. The other thing to say is that it isn't just about the level, it's also about the slope of the curve, and if the R goes above one anywhere, then that would eventually lead to an exponential rise and a second peak and an overwhelming of the NHS in that area unless it's addressed, so although the level of the number of cases is different in different parts, the slope of the curve has actually been remarkably similar across the country, so that argues for doing things as a whole country together."

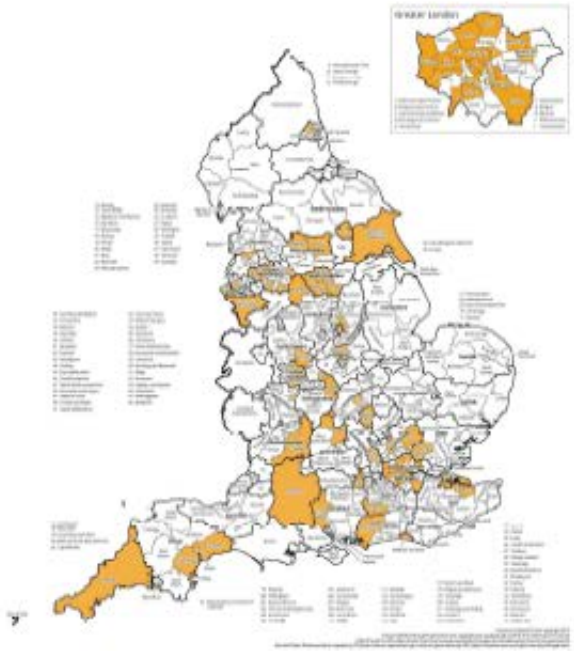
326. The Government was therefore responding to both known and unknown cases of COVID-19 all around the country: had there been no such known or unknown cases, it would not have acted. The Government considered acting locally on the worst parts of the outbreak, but decided on analysis of all areas that every area justified the measures.

327. Further, during March 2020, the Government was conducting (limited) testing for COVID-19 of specimens at laboratories across the UK. 'Reported Cases' data is made up of positive test results or 'lab-confirmed cases' of COVID-19, and is publicly available at national, regional, Upper Tier Local Authority and Lower Tier Local Authority level. Based on the Reported Cases data,[315] it is known that COVID-19 was sufficiently widespread that it was present within every one of the 317 LTLAs in England by at least 31 March 2020, every LTLA in England other than North Devon by at least 23 March 2020, and every LTLA other than 19 LTLAs (so, 94%) by at least 16 March 2020.[316]

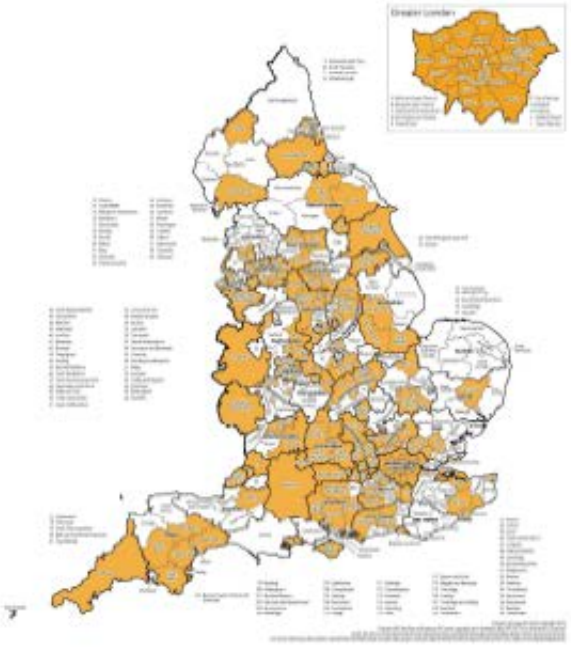
328. The following maps have been created using the Reported Cases data, and show whether LTLAs had their first Reported Case by four dates: (a) 2 March; (b) 9 March; (c) 16 March; and (d) 23 March. These show the spread of the disease during the critical decision making period for the Government:

[315] As the Reported Cases data stood at 19 May 2020. The Department of Health and Social Care tweeted daily updates on the number of people tested for COVID-19, the result of the test, and the number of deaths from COVID-19, from 29 February 2020 onwards: see, for example, the summary of the data from these tweets from 1 March 2020 to 31 March 2020 inclusive in Agreed Facts 3 {C/45/1933}.
[316] See Agreed Facts 3 {C/45/1914}.

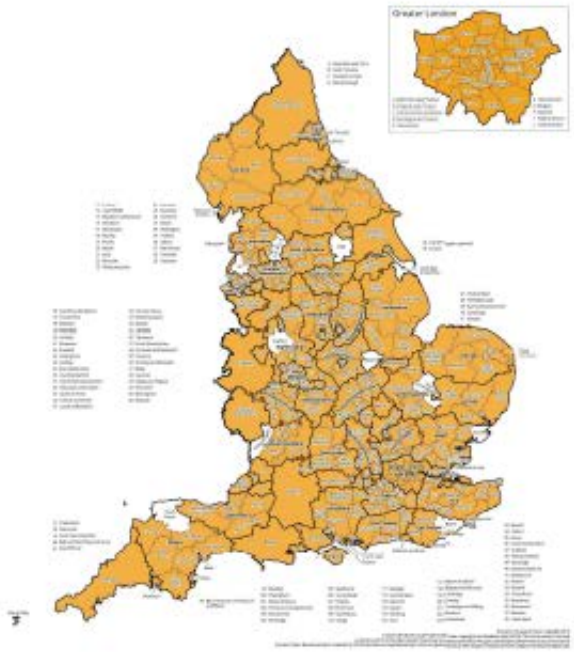
Map showing which LTLAs had their first Reported Case of COVID-19 up to and including 2 March 2020



Map showing which LTLAs had their first Reported Case of COVID-19 up to and including 9 March 2020

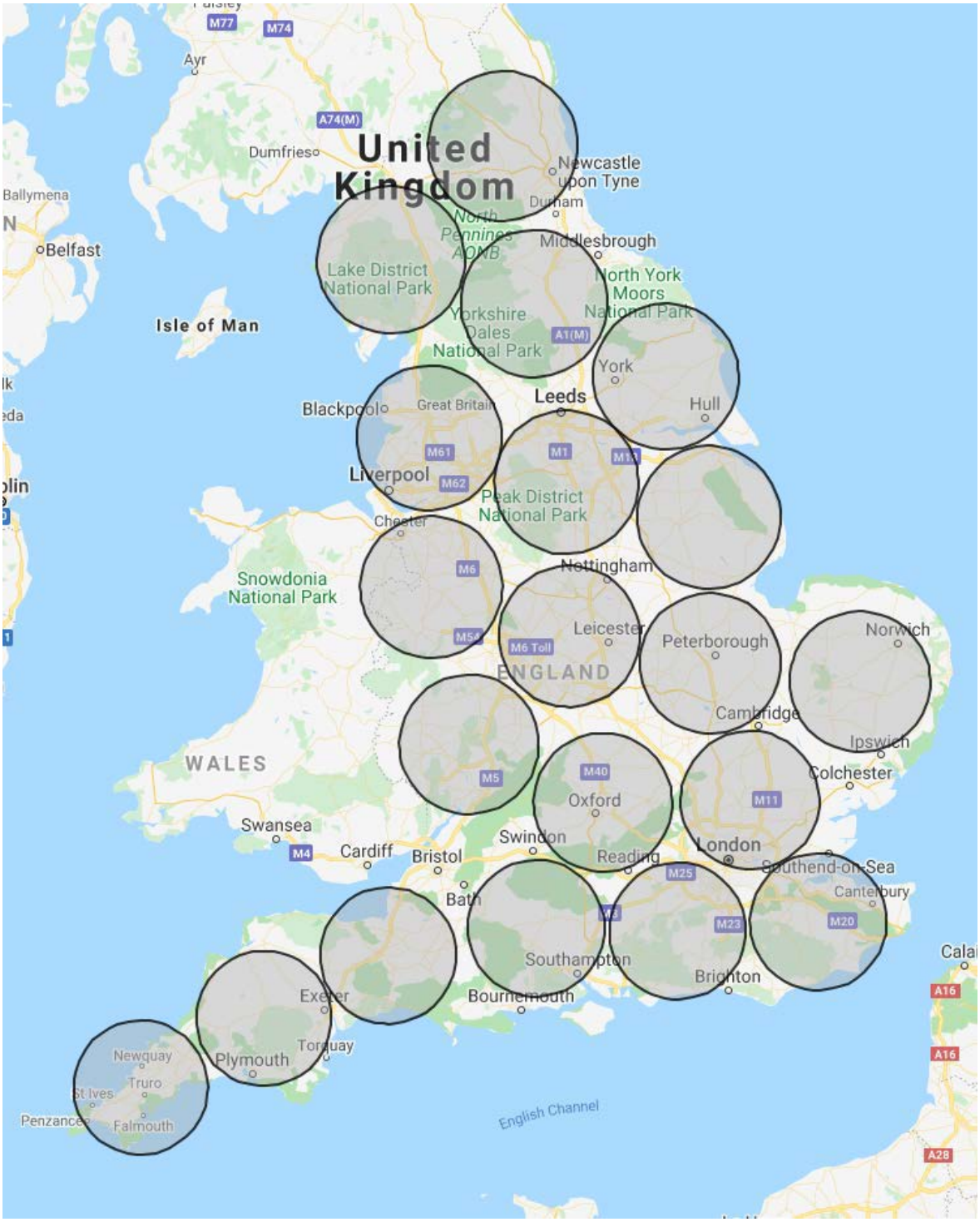


Map showing which LTLAs had their first Reported Case of COVID-19 up to and including 16 March 2020



Map showing which LTLAs had their first Reported Case of COVID-19 up to and including 23 March 2020

329. The following map shows that the whole country is covered by just twenty 25-mile radius circles:



330. It may never be possible to get more evidence about the inner workings of the Government than the data above (including Mr Hancock's statement), but it amply justifies the judicial finding that "*the government response was the reaction to information about all the cases in the country, and that the response was decided to be national because the outbreak was so widespread*" and so "*all the cases were equal causes of the imposition of national measures*" (Judgment [112]).

331. Any appeal to this finding would be a direct challenge to the findings of the Court below on a matter of fact, and would come nowhere near the high threshold needed for an appellate court to overturn such findings on appeal (which threshold does not depend upon there being oral evidence at trial).[317]

332. Argenta and QBE purport to appeal this finding,[318] but when one reads their Case it is apparent that they appeal a finding not made by the Court. Their point is that it was not possible on the available evidence to find that the national measures would not have been adopted *but for* <u>any</u> particular case or even but for any particular 2,000 square mile 25-mile radius circle.[319]

333. The Court did not in fact find that the national measures would not have been the same but for the disease within every particular 2,000 square mile 25-mile radius circle (considered individually). See Judgment [81]. That is not surprising—the Court was not considering any particular area, and plainly the answer may be different if one posits a UK with no cases in Greater London as compared with an area with no cases in the Scilly Isles.

334. But equally the Court did not find the opposite—that the national measures would have been the same but for the disease within every particular 2,000 square mile 25-mile radius circle (including e.g. London) individually. That was and is asserted by at least some insurers, who argue that the cases in every single policy area "*made no difference to, and did not cause, the Government's action*", and that "*the Insured would still have suffered exactly the same interruption of or interference with the insured business, if the proved case or cases of illness from COVID-19 within the relevant area had not occurred*".[320] They need to do so because otherwise they have to concede that at the very least whether there is cover is a question of fact, and further the holes in their case as the jigsaw cause start to show.

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[317] See the law summarised by this Court in *Perry v Raleys Solicitors* [2019] UKSC 5, [2020] AC 352 at paras 49-51 {G/76/1540}.
[318] Argenta Appeal Case paras 97-105 {B/5/148}, QBE Ground 3 paras 53-5 {A/8/203}, QBE Appeal Case para 88 {B/8/280}.
[319] Argenta Appeal Case paras 102-3 {B/5/150}.
[320] MSAmlin Appeal Case paras 2.3-2.5 {B/7/206}. See, similarly, RSA Appeal Case at para 70(a) {B/9/317}.

335. But the insurers' contention (itself unsupported by evidence) that *"those restrictions would have been imposed in any event regardless of whether or not there were occurrences of Covid-19 within 25 miles of any given policyholder*"[321] is highly implausible. If COVID-19 had been everywhere in the country save there had been a huge island (a 25 mile radius creates an area of just under 2000 square miles) centred on London where, miraculously, as the cases and deaths rose around the country, there remained not a single case in London (or imagine the maps above with a big empty bubble in the middle), then it is inconceivable that the same measures would have been taken in London as elsewhere, given the Government's obvious concerns to limit damage to the economy and infringement of civil liberties. It is hard to see how the insurers could even assert that. Of course, there would be some strange features of this counterfactual: medical researchers would have flocked to London to learn what they could. It may even (on insurers' case) mean that, given the movement of people into and out of any London 50 mile wide circle (extending for example to Maidenhead to the west), under the counterfactual London is permeable to people but impermeable to the virus, i.e. cures all who enter it. Or, to attempt to make the counterfactual more realistic, given its spread, if there was no COVID-19 in London there would have been next to no COVID-19 around the country. The insurers resist explaining their case at a level that could enable it to be applied.

336. But on any view, it is very unlikely that the Government would have taken the very severe measures that it did on a national scale, without a London carve-out, given its concerns for the economy and personal freedoms. The likelihood is that, instead, London would have been restriction-free and the most popular place on the planet, being the safest and the only one open for business. That would presumably allow each London insured to recover phenomenal windfall profits. On a smaller scale, the Court below accepted this argument, rightly saying (in the context of holiday accommodation) that "*whether that accommodation was within an area of some 2,000 square miles with no COVID-19 or alternatively was in an area with COVID-19, would have been relevant to decisions as to where to go on holiday*".[322]

337. But what is clear is that the factual question of whether but for COVID-19 in a particular 50-mile bubble the national measures would have been imposed is left open.

338. The insurers try to close off this argument because they repeatedly suggest that the FCA conceded below that the Government's action would have remained the same irrespective of

[321] Argenta Appeal Case para 93 {B/5/146}.
[322] Judgment [162].

cases in any given policy radius.[323] That is incorrect, and the references to documents which are said to demonstrate this concession do not bear it out.[324] The FCA's case was made clear in its skeleton argument for trial at para 241 (emphasis added):

> "The Government responded to the fear/risk/danger/emergency/prevalence of COVID-19 all around the country and the incidence of the disease. Had there been no such fear/risk/danger/emergency/prevalence anywhere, it would not have acted. But had there been such fear etc in the entire country other than any one 25 mile radius (2,000 square mile) area, it would probably still have acted.
>
> *Footnote 236*: Although whether it would have acted nationally, or would have excluded the strangely immune from the Government action on the basis that it was not needed there and it was better to keep that economy going, is a further question."

339. Argenta[325] seeks to rely on what was said by the Court at Judgment [418] in the context of a wholly different clause (the Hiscox NDDA clause) to suggest that somehow the Court has rejected the above causation argument. That clause only responded when "*an incident occurring … within one mile of the insured premises*" resulted in a denial or hindrance of access being imposed by the authorities. The Court held (and the FCA does not appeal against this) that the word "*incident*" was intended to address something specific like a gas leak, bomb scare or traffic accident (Judgment [404]), was not synonymous with an emergency or a danger, and did not encompass the presence of someone in the radius who had COVID-19 ([405]). It is therefore unsurprising that the Court held at [418] that such a contemplated specific incident, even if it did encompass a person with COVID-19, could not be said to have caused Government restrictions. What Argenta does not mention is that at Judgment [417] the Court commented that the position as regards causation might be different if the wording had referred to "*an emergency endangering human life*" rather to "*an incident*". In other words, the approach to causation will be and was affected by the nature of the phenomenon with which one was dealing. This makes perfect sense and supports the FCA's case.

Policy intention and proximate cause – the law

340. The proximate cause rule is based on the implied intentions of the parties, as explained by Lord Sumner in *Becker Gray & Co v London Assurance Corp* [1918] AC 101 at 112-4.[326] Lord Atkinson

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[323] See, for example, MSAmlin Appeal Case paras 2.5 {B/7/206}, 51.1, 52.6 and 73.3 and the footnote references, and Argenta Appeal case paras 17 {B/5/121} and 93.

[324] MSAmlin Appeal Case paras 2.5 {B/7/206} and 51.1 and footnotes cites: FCA reply para 52 {G/21/169} which says "*it is not alleged that the advice given and/or restrictions imposed by the UK Government (or any of the devolved administrations) were caused by any particular local occurrence of COVID-19, but they were caused by the outbreak of COVID-19 which was no more than an aggregate of local occurrences of COVID-19 throughout the UK*", and the FCA's Trial Skeleton at para 241 which is cited in the body.

[325] Argenta Appeal Case para 99 {B/5/149}.

[326] See also *Nelson v Suffolk Insurance Company* 8 Cush 477 (1851) per Fletcher J at 490 {G/69/1252}; *Leyland Shipping* per Lord Atkinson at 365 {E/27/891} and Lord Shaw at 370 {E/27/896}.

in *Leyland Shipping Co Ltd v Norwich Union Fire Ins Sy Ltd* therefore noted that the proximate cause rules "*must be applied with good sense to give effect to, and not to defeat the intention of the contracting parties*"[327]. This means that it is subject to modification (to be made more strict or more relaxed than otherwise) by the express words used in the contract and more generally by construction of the policy.[328] Asking whether the loss was proximately caused by the insured peril so that cover responds, in circumstances in which there were other concurrent or intervening causes, is a question not of philosophy but of asking, on the proper construction of the policy, "*has the event, on which I put my premium, actually occurred*?"[329] None of this is disputed.[330]

341. This justifies the distinction that the Court contemplated in relation to the application of the causation test between, for example a clause contemplating an "incident" and one contemplating "an emergency endangering human life".

Concurrent causes – the law

342. As the modern case law confirms, there is no need to contort one's reasoning so as to select one single cause to the exclusion of others, i.e. there will in some cases be more than one proximate case.[331] It is enough if the insured peril is *a* proximate cause. The leading case on multiple proximate causes is *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The "Miss Jay Jay")* [1987] 1 Lloyds Rep 32 (CA). A yacht suffered damage due to the equally operative causes of faulty design/unseaworthiness on the one hand and an adverse sea on the other. The policy covered damage 'directly caused[332] by… External accidental means' and so responded. The Court considered and obiter approved the legal position for excluded perils set down in *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corp* [1974] QB 57, namely that where there are two concurrent proximate causes and one is covered and the other excluded, the policy does not respond.[333]

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[327] At 365 {E/27/891}.
[328] As section 55(1) Marine Insurance Act 1906 makes clear, by introducing the proximate cause principle with "*unless the policy provides otherwise*" {E/6/94}.
[329] Lord Sumner in *Becker Gray* at 118 {E/10/184}.
[330] Judgment [524], Argenta Appeal Case para 38 {B/5/127}, RSA Appeal Case para 65 {B/9/316}.
[331] See the comments of Cairns LJ in *Wayne Tank* at 68-9 {F/50/1055}, and Christopher Clarke LJ in *Atlasnavios Navegacao Lda v Navigators Insurance Ltd (The B Atlantic)* [2016] EWCA Civ 808, [2017] 1 WLR 1303 at paras 28-32 {G/44/341}.
[332] Held to mean the same as 'proximately caused': Slade LJ at 39 col2 {E/23/587}.
[333] The *Wayne Tank* principle does not apply here as there is no applicable exclusion, but if it were held to apply the FCA reserves the right to argue that the principle is not as absolute as it is sometimes taken to be, and really depends upon construing the parties' intentions in a particular case to determine whether, reading the insuring clause and the exclusion together, the events that occurred are or are not intended to be covered {E/23/580}.

343. However, in *The Miss Jay Jay* there was no exclusion of unseaworthiness[334] and so, as Slade LJ observed at 40 quoting from *Halsbury's*: "*there may be more than one proximate (in the sense of effective or direct) cause of a loss. If one of these causes is insured against under the policy and none of the others is expressly excluded from the policy; the assured will be entitled to recover.*" Given that the unseaworthiness was not "*such a dominant cause that a loss caused by the adverse sea could not fairly and on common-sense principles be considered a proximate cause at all*"[335], the policy responded as both were proximate causes.[336] Thus in *Kuwait Airways Corp v Kuwait Insurance Co SAK* [1999] CLC 934 (HL) per Lord Hobhouse at 947:[337]

> "It is not disputed in the present case, and it is the law, that where there are a number of perils covered by the policy it suffices for the assured to prove that his loss was proximately caused by any one of the perils covered. Similarly, if there is an exclusion, the assured is not entitled to recover under the policy if the excepted peril was a proximate cause of the loss."

344. These principles were approved by the Supreme Court in *Ene Kos I Ltd v Petroleo Brasileiro SA ("The Kos")* [2012] 2 AC 164,[338] Lord Mance confirming that there can be more than one proximate cause and (emphasis added) "*the question in each case, whether under a contract of insurance or under a contract of indemnity, is whether* ***an*** *effective cause of the alleged loss or expense was a peril insured against or an indemnifying event.*"[339] These principles are also agreed.[340]

345. Concurrent causes will usually arise in two situations:

345.1. <u>Interdependent concurrent causes:</u> where there are two events each of which could not, without the operation of the other, have caused the loss[341] (i.e. each was a necessary cause but neither was sufficient on its own to cause the loss). Most of the concurrent cause cases considering proximate cause fall into this category, or at least are assumed to do so—e.g. in *The Miss Jay Jay* the combined effect of the unseaworthiness and the adverse sea caused the loss.

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[334] Lawton LJ at 36 {E/23/584}, Slade LJ at 40. Nor was there a warranty of seaworthiness: Slade LJ at 39.
[335] Lawton LJ at 37 {E/23/585}.
[336] As Colinvaux observes at para 5-092, the specific conclusions in relation to unseaworthiness were modified in *The Cendor Mopu* but "*the general principle applied by the Court of Appeal in* The Miss Jay Jay *is nevertheless sound in respect of cases where there is an insured peril and an uninsured peril operating concurrently*" {G/104/2146}.
[337] {G/63/1119}.
[338] Lord Clarke at paras 70-75 {E/15/297-298}.
[339] Lord Clarke at para 70 {E/15/297}.
[340] Insurers Joint Causation Skeleton para 51 {G/11/117}.
[341] *Colinvaux* para 5-096 {G/104/2147}.

345.2. Independent concurrent causes: where there are two events, each of which was independently capable of causing the loss (i.e. each was sufficient on its own to cause the loss).

346. There is also potentially an intermediate category of interlinked concurrent causes, in which separate causes either occurring in causal succession or forming part the same phenomenon cause loss in circumstances where, due to their interlinkage, it is impossible to identify a separate causative contribution to the loss for each cause. This may properly be regarded as simply a variant of interdependent causes. An example of the former is *The Silver Cloud*,[342] which is addressed below at 451ff. An example of the latter is this case (if, that is, it is not a pure interdependent cause case) as the Court has contemplated.

347. In any event, there are concurrent *proximate* causes only where the concurrent causes are of equal or nearly equal efficiency in bringing about the damage.[343] If one of the rival causes was the effective and dominant cause, there are not concurrent proximate causes but rather a single proximate cause.

Consideration of the facts and policy intention

348. It must always be remembered that what the Court is doing here is asking what a reasonable person would have considered that the parties intended by the words they used in the policy. Take the example of one of the HIGA Interveners, the well-known retailer Radley, which has 340 locations across the UK.[344] COVID-19 will have occurred within a 25-mile radius of all or substantially all of those locations. All the areas of the country aggregated were concurrent causes of the Government action, but no single area would independently have caused the Government action. On insurers' argument, because no *single* occurrence or no *single* radius was the cause of any loss, because any loss would have resulted from disease everywhere else. Can this really have been the intended result of the proximate cause test?

349. The FCA's primary case is that as found by the Court, there are concurrent proximate causes, with the cases in each policy area (the known and the "known unknown" due to low levels of testing and recording) making their own equal causative contribution to the decisions made and actions taken by the Government. This is a conventional causation analysis. Insurers baulk at

[342] {E/19/442}.
[343] *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Association* [1974] QB 57 at 67 {F/50/1055}, *Miss Jay Jay* at 36 col 2, {E/23/584} 40 col 1&2 and 41 col 1. See also *Svenska Handelsbanken AB v Dandridge* [2002] 2 Lloyd's Rep IR 421 at para 48 {G/85/1685}.
[344] HIGA trial skeleton para 28-30 {G/10/97}, HIGA oral reply submissions at Day8/183-184 {G/29/219}.

having so many concurrent causes[345] but make no principled objections and this is not a novel situation. In the law of tort, where on the balance of probabilities an indivisible injury is caused by two (or more) factors operating cumulatively, one (or more) of which is a breach of duty, causation in respect of the breach of duty will be established and it is immaterial whether the cumulative factors operate concurrently or successively.[346]

350. What made *Fairchild* a special case was that for mesothelioma, which *Fairchild* addressed, it was known that only a very few fibres out of many tens of thousands or hundreds of thousands of fibres or more in the victim's lungs would have triggered the particular cell mutations that resulted in the development of the malignant cell that progressed into mesothelioma but it could not be proved when and in what circumstances those particular fibres were inhaled; thus it was impossible as a matter of evidence to prove causation on the balance of probabilities. That would be equivalent in this case to saying that it was known that a particular case or cluster of cases of COVID-19 caused the Government to act but it could not be proved which case or cluster of cases it was. That is not the position here though.

351. It is provable and has been proved on the balance of probabilities that the Government did rely and act on the information that the statisticians and scientists were providing to it about all the known and assessed (known unknown) incidence of cases of Covid-19 in the country. This is analogous to the pneumoconiosis cases in which it is provable that the dust will have caused scarring to the lungs and it is the cumulative effect of all the scarring that leads to the pneumoconiosis symptoms from which the victim suffers. There is a further parallel with this case in that in that example it could be said that but for any particular episode of inhalation, the pneumoconiosis would have been just as severe, but that is answered by the reality that all of the fibres inhaled have in fact contributed cumulatively to the overall condition.

352. The conclusion that the different cases and areas of the outbreak were all equally effective (i.e. proximate) causes is a deeply unsurprising conclusion given the evidence referred to above, and the lack of any evidence that, for example, the Government was reacting only to the existence of the disease in particular bellwether locations without regard to the existence in other locations. It is also of a piece with the findings of Tomlinson J in *The Silver Cloud* that "*the events of 11 September and the* [many] *warnings* [from 12 September 2001 and the end of 2001[347]] *were*

[345] Argenta Appeal Case para 100 refers to 11,658 cases at the date of the 26 March Regulations, although disregards the fact that at least within the perimeter one needs to gather all the cases within the 25 miles/1 mile as a single cause (the disease within the perimeter) {B/5/149}.

[346] *McGhee v National Coal Board* [1973] 1 WLR 1, 8 {G/68/1233} recently considered and applied in *Williams v Bermuda Hospital Board* [2016] AC 888, Lord Toulson at para 38 {G/93/1948}.

[347] The many state warnings over this period are described at para 8.

concurrent causes of the downturn in bookings, including cancellations thereof, and since the consequences of the events of September 11 are not for the purposes of section A.ii excluded from the ambit of the cover, a claim under the policy must lie" (citing *Wayne Tank*).[348] Although of course a decision on its own facts and policy language, it is nonetheless a relevant decision on the application of causation requirements to interlinked successive concurrent causes of loss which Tomlinson J was able to reach by a common sense analysis, and without needing to resort to any academic causation analysis or legal analogies.

353. This approach to causation is even more obviously appropriate where the policies use language which does not require the disease to be proximately causative (e.g. "following" in Hiscox 1-4, MSAmlin 1-2, RSA3, considered below).

354. In truth, none of the insurers identify a cause that they say is such a dominant cause as to mean that the cases of the disease within the perimeter (i.e. the 2,000 square miles) were not even *an* effective cause. Indeed, they barely mention proximate cause.

355. Instead, the insurers seek to get around this causation argument by leading the Court down the garden path of the application of 'but for' causation. As has already mentioned and is addressed further below, there is on analysis no insurance case in which the 'but for' test has been applied either instead of or as an ingredient of the statutory proximate cause test. The requirement for a proximate cause that it be an effective cause of the loss is all that the law needs and has needed to answer causation issues for an insurance policy, which, as has been explained, raises different considerations from the imposition of liability to pay compensatory damages for breach of duty.

356. However, even if a 'but for' test is to be applied at the causation stage and certainly when applying any 'but for' test at the quantification stage under a trends clause, it is necessary in the context of the nature of the risk insured and in order in that context to give effect to common sense and the presumed intentions of the parties to ask not merely what would have happened 'but for' COVID-19 in the radius, but rather what would have happened 'but for' COVID-19 in *every* radius. Providing those causes were part of a set of events which common sense dictates are inextricably linked, and in fact combined cumulatively so as cause the Government to act as it did, the necessary causal test is satisfied. No single occurrence of a disease is a 'but for' cause of the Government action, but without any occurrences there would be no pandemic or Government action. Common sense causation avoids the absurdity of a but for test's conclusion by aggregating the causes (reflecting language and common sense) to ask what would have

[348] Para 69 {E/18/420}.

happened but for *all the jigsaw pieces*: they are either all treated as a single whole, or as multiple concurrent effective causes.

357. By contrast, the Defendants' counterfactual appears to be geared to achieving the solution that no policies will pay because of the incidence of COVID-19 outside the policy area (as explained above).

358. For disease wordings, the consequences of the insurers' interpretation requires the consideration of counterfactual where there is disease everywhere except within 25 miles. This presumably might involve modelling the public's actions had there been no disease within an area, perhaps requiring experts on government responses to disease, on customer behaviour, on economists, *etc*. Yet is it realistic to think that a Court could ever decide how the UK Government would have acted if (say) there COVID-19 was rife through England but could not penetrate inside the M25? This sort of sophisticated modelling exercise that neither the SME policyholder, nor the loss adjuster (nor a Court) would be equipped to conduct. Even if they could be conducted, they could never be done in an affordable way – these extensions generally have five- or low six-figure sub-limits.

359. If and to the extent that a 'but for' test is to be applied, the task on the Court is therefore to construe what the parties intended should be considered the counterfactual, i.e. but for what? The indemnity is for an infectious disease, sufficiently serious to be on the list of those which require notification to the authorities, across a wide area (typically 2,000 square miles in the policies before the Court). It is in the nature of such diseases to spread, and widespread authority action is necessarily contemplated by – and merely an ordinary consequence of – such cover. It may often be difficult if not impossible to prove what precise cases an authority was responding to or how precisely it would have acted if a set of cases was removed. But can the parties really have intended that such an exercise should be undertaken? The FCA says not.

360. QBE argues on this appeal that COVID-19 elsewhere in the country "*may be the causal origin of the local cases but it is a separate cause. It may be viewed as a cause of a cause*".[349] This is a *non sequitur* in that the first cases of COVID-19 in the UK (insofar as they could be viewed as the 'origin' of the pandemic) will have occurred within a policy radius. (Argenta and RSA are also wrong to suggest that the FCA has somehow conceded that the pandemic caused the occurrences of COVID-19 in every policy area: the FCA has never done so.[350] As the FCA said "*The pandemic*

[349] QBE Appeal Case para 79 {B/8/278}.
[350] RSA Appeal Case para 69 {B/9/317}, Argenta Appeal Case para 14 {B/5/121}. The FCA's reply para 58.1 says: "*Just because a matter is caused by or results from one thing does not mean (i) it is not also caused by and results from another and/or (ii) that the two*

is not the cause of occurrences within 25 miles of different premises, the pandemic is comprised of them. Without those occurrences there is no pandemic (and, of course, no governmental or public response to it)."[351]) It also seems to be contemplating a distinction between a disease which originates within the policy radius and then spreads outside it, and one which originates outside and spreads within, with cover provided in the former but not the latter case. There is no reason why the parties would have intended such a distinction: both diseases come within the policy radius.

Postscript: proximate cause and the causal connectors

361. In order to establish cover on this alternative case the policyholders need to establish interruption or interference (or restrictions in the case of Hiscox) "*following*" (MSAmlin1-2, RSA3, Hiscox1-4), "*as a result of*" (Argenta), "*arising from*" (QBE1) or "*in consequence of*" (QBE2-3) the notifiable disease within 25 miles/1 mile.

362. It is not disputed that where the term 'resulting from' or (usually[352]) 'arising from' is used within a peril to link disease and interruption, that imposes a test of effective cause equivalent to proximate cause. The words "in consequence of" are not necessarily indicative of proximate cause. The authorities cited in MacGillivray (14th edn) at paragraph 21-004 for the proposition that such words will not prevent the operation of the rule cites authorities that were in fact addressing the war risks free from the *"consequences of hostilities"* warranty.[353] That is both different language and a wholly different context and those authorities do not support the statement in the text. In the context in which the words "*in consequence of*" are used and given the choice of causation language that was open to the insurer, there is a sound basis for concluding that a lesser causal requirement than proximate cause was intended. But in any event, as explained above, the insurers advance no argument of principle as to why the disease within a radius is not a concurrent effective cause of the interruption.

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things are not inextricably linked so as to amount to a single cause or single set of concurrent interdependent causes at least for the purposes of application of a 'but for' test. This is especially true where one of the things (COVID-19 in the UK) is the underlying cause of the other (such as the presence of the disease within the Relevant Policy Area) or where one of the things (such as the presence of the disease within the Relevant Policy Area) is an indivisible part of the other (the COVID-19 outbreak in the UK)" {G/21/170}. This is self-evidently not a concession that the pandemic 'caused' the occurrences of COVID-19 in every policy area, not least for the reasons given in the text, i.e. the first cases will have to have been somewhere. It was addressing insurers' argument that the effect of the 25-mile radius requirement was to mean there was cover only for interruption caused by disease within the radius: see para 58.4(b) "*stipulating that a disease must occur within a vicinity is not effective to indicate to the reasonable reader that any non-local part of the same disease outbreak is a separate competing cause that could prevent cover, or is to be retained in a 'but for' counterfactual so as to potentially eliminate or substantially reduce cover, or dramatically increase cover to include windfall profits*" {G/21/171}.

[351] FCA Trial Skeleton para 941 {G/5/39}.

[352] See *Beazley Underwriting v The Travelers Companies* [2012] Lloyds' Rep IR 78 at 128, per Christopher Clarke J: "*arising out of…does not dictate a proximate cause test, and… a somewhat weaker causal connection is allowed*" {G/46/404}.

[353] {E/44/1210}: *Ionides v Universal Marine Insurance Co* (1863) 14 C.B.(N.S.) 259 {E/20/456}; *Liverpool and London War Risks Assurance Ltd v Ocean Steamship Co* [1948] AC 243 {G/66/1165}. See further *Colinvaux* at 5-084 {G/104/2145}.

363. The insurers nevertheless expend some energy trying to explain that causal connectors within the peril apply a proximate cause test. Further, MSAmlin argues that 'following' in MSAmlin1 (linking the disease to interruption) and MSAmlin2 (linking the disease to loss), and RSA argues that 'following' in RSA3 (linking the disease to interruption) argue that 'follow' requires a full proximate cause test.[354] As to that:

363.1. In a context in which 'resulting from' is used in these policies—indeed in the very same clauses but for different links—the High Court rightly accepted the FCA's submissions that 'following' imported a looser causal requirement than proximate cause, although going beyond merely later in time and requiring an element of consequence: Judgment [95, 111, 194].

363.2. MSAmlin and RSA are wrong to dispute it, and nothing they say can get around the obviously looser implication of 'following' when chosen over 'resulting from' (a well-known synonym for effective causation).

363.3. More realistically, Hiscox agrees the FCA's position.[355]

363.4. It is important to note that MSAmlin and RSA advance this argument not because they say that the disease did not proximately cause the interruption, but because they believe it gives them a stronger argument that a but for test applies to the link between the disease within 25 miles and interruption. But, as set out above, (i) on the proper construction of the term 'following' and these policies more broadly there is no warrant for importing such a test, (ii) even if the proximate cause test did apply in full it would not import a but for test, (iii) any but for test that did apply would be satisfied here by the interlinked causes that together comprise the pandemic. Butcher J rightly summarised the principle in argument as follows: "*where you have related causes… and they lead to effects which it is impossible to allocate between the two, the insurers pay for the combined effect*".[356]

<u>Postscript: the but for test and case law</u>

364. It is necessary to consider why the 'but for' issue is so important to insurers, given that the FCA and Court accept that a 'but for' test applies under all the wordings' quantification machinery. Why are the insurers so desperate to assert that the test forms part of a proximate cause

[354] MSAmlin Appeal Case paras 56-9 {B/7/226}, RSA Appeal Case paras 44-8 {B/9/308}.
[355] Hiscox Trial Skeleton paras 269-270 {G/8/60}.
[356] Day4/122-123 {G/25/192}.

requirement? The answer is (i) they know and accepted at trial that the trends clauses are not intended to change the fundamental nature of the peril insured, and must recognise that if the cover is triggered they have a presentationally impossible task to then say that the trends clause nevertheless removes all cover for all these claims, (ii) they want to bypass the Court's construction conclusions by suggesting wrongly that there is some unassailable principle of law that prevents those conclusions, and (iii) they are, in fact, primarily not interested in applying but for causation even at the proximate cause stage—the link between the insured peril and the loss—because that comes in after a proper construction of the insured peril, and their real prize is to show that but for causation applies as part of the words 'resulting from', 'following', 'in consequence of' and 'arising from' that link the disease or emergency with the interruption/prevention (although even then it is the construction question that resolves what the intended purpose of a radius criterion is in this context). Hence, for example, MSAmlin's argument is: the but for test is a necessary part of proximate cause, the causal connectors within the peril—including that the interruption must 'follow' the disease within 25 miles—import proximate cause, therefore there is a 'but for' test between the disease and interruption quite apart from the but for test the parties have agreed in the trends clause between the insured peril and loss.[357]

365. When seeking to answer the question of whether the 'but for' test is necessary for proximate cause, or indeed necessary at every stage of the intra-peril connections (did the restrictions result from the disease, did inability to use result from the restrictions etc) as the insurers contend, Butcher J asked the question of whether there were any insurance cases that made clear that a but for test applied[358]. The insurers had hundreds of years of case law to consider, and huge resources to consider it with, and the only example they could come up with (other than *Orient-Express*) was the first of those listed in MSAmlin's Appeal Case (MSAmlin taking the lead on causation) at paragraph 69.1. It, and the second case located since trial, provide no foundation for the supposedly central principle of law, or for the argument that the Court was wrong at Judgment [523] that proximate cause and not 'but for' is the primary insurance question (i.e. but for is not applicable as a separate or necessary part of the proximate cause test, although can be relevant to it).

366. The first case is the Court of Appeal decision of *Blackburn Rovers Football v Avon Insurance plc.*[359] In that case, a football player suffered total disablement following an injury during a practice match in training. Accidental Bodily Injury was a covered peril. 'Death or disablement directly

[357] E.g. MSAmlin Appeal Case paras 70-1 {B/7/232}.
[358] Day4/29-36 {G/25/184}.
[359] [2005] EWCA Civ 423, [2005] Lloyd's Rep IR 447 (CA) at para 18 {E/11/195}.

or indirectly resulting from or consequent upon Permanent Total Disablement attributable either directly or indirectly to arthritic or degenerative conditions…' was excluded. The focus was on whether on its proper construction the exclusion could include normal degenerative conditions (preliminary issue 3 in the headnote).[360] The Court of Appeal confirmed that the disablement was what happened at the time of the injury. If the degenerative condition contributed to the extent or degree of the disablement that did not mean that the disablement (the injury to the disc[361]) was attributable to the degenerative condition. Lord Phillips MR[362] illustrated this by explaining that if without the training accident there would not have been disablement, whereas if without the degenerative condition there would still have been disablement (albeit possibly to a different degree), then the exclusion was not satisfied.

367. This was a conclusion on construction and application of the term 'attributable either directly or indirectly' in the exclusion clause. However, the detail of the judgment of Lord Phillips MR merits consideration. At paragraph 10 he observed that the trial judge disregarded the proper principles of causation. Lord Phillips then went on at paragraphs 11-15 to address the proper principles of causation, unsurprisingly setting out the proximate cause causation rule and making no mention of a 'but for' test. His criticism of the trial judge's reasoning at paragraphs 16-20 focussed on the terms of the exclusion. He then returned at paragraph 19 to what the answer on the facts should be "*If a proper test of causation is applied*", having explained earlier in the judgment that the proper test was that of proximate cause and having expressed the issue in the case (at paragraph 13) as being that the phrase in the exclusion "attributable either directly or indirectly" "*opens the door to the argument that, if degeneration of Mr Dahlin's disc was a proximate cause of his sustaining injury to it alleged to have occurred [in the training accident], the Exclusion applies*". This case, which was and remains the high-water mark of insurers' case that the proximate cause test involves asking a 'but for' question, cannot bear the weight that insurers seek to place upon it.

368. The second case is the Scottish first instance decision of Lord Hodge in *McCann's Executors v Great Lakes Reinsurance (UK) plc*,[363] a case the insurers have located post-trial. A 77-year old man with chronic pulmonary and heart conditions suffered a road traffic accident, causing rib fractures and other injuries. He died a few days later from respiratory and cardiac failure caused by pneumonia. He had cover for death solely caused by bodily injury. The sole cause clause excluded the effect of *Miss Jay Jay*—if the prior medical conditions were a concurrent proximate

[360] First page, right hand column confirms "*The insurers appealed against the finding on preliminary issue (3)*" {E/11/190}.
[361] See further para 19 {E/11/195}.
[362] Paras 17-18 {E/11/195}.
[363] [2010] CSOH 59 at para 12 {E/43/1200}.

cause with the bodily injury (the accident) then there could be no cover.[364] Whether the pre-existing condition was a concurrent proximate cause was a question of degree.[365] Lord Hodge found on the facts of the case that the conditions were not mere predispositions, they were diseases for which the insured was being treated, and so were a concurrent proximate cause meaning the policy would not respond.[366] It is right to say that at paragraph 12 Lord Hodge did state in passing that "*It appears to me that in using the concept of proximate cause the court in most circumstances applies not only a 'but for' test to establish a causal connection between two or more events on the particular occasion but also further tests such as directness of effect and the degree of causal connection of an event to identify an operative cause*".[367] He then went on to explain that this would depend upon the terms of the contract,[368] and went on to apply the principle as above (deciding that the degenerative condition was a proximate cause). The 'but for' test was not mentioned again.[369]

369. It is not for the FCA to disprove the proposition that the but for test is a part of proximate cause in insurance. The FCA merely relies on the ubiquitous explanations of proximate cause as based on directness, common sense and intention. But it is worth noting one case in passing, *McCarthy v St Paul International Insurance Co Ltd,*[370] a decision of the Federal Court of Australia. This is relevant for showing a Commonwealth approach to a part of the *Wayne Tank* principle (where the covered and excluded causes are independent and not interdependent), rejecting the blanket approach that where there is a covered proximate cause and an excluded concurrent proximate cause there is no cover.[371] But it is relevant to 'but for'.

370. A mortgage-lending firm of solicitors faced 39 claims 'arising from' advice in recommending investments to clients. It claimed under defence costs cover. 36 of the claims related to dishonest actions of an employee, and there was an exclusion for claims 'brought about by' dishonesty of employees.[372] Some defence costs were referable to all the claims, i.e. all of the excluded 36 claims and the covered 3 claims.[373] In relation to the question of whether a concurrent proximate clause being excluded prevents cover, Kiefel J (now Chief Justice of Australia), noted at paragraph 109 "*In these cases, even though it could be posited that the damage may or would have occurred in any event by the cause that was not excluded, the fact is that the policy in each case was*

[364] Para 26 {E/43/1206}.
[365] Para 26-7{E/43/1206}.
[366] Para 28 {E/43/1207}.
[367] Para 12 {E/43/1200}.
[368] Para 13 {E/43/1201}.
[369] *Blackburn Rovers* was cited at para 26 in relation to whether a prior normal predisposition could be a rival cause (but not in relation to the but for test, which formed no part of this decision).
[370] (2007) 157 FCR 402 {G/100/1991}.
[371] See paras 97 {G/100/2021} and 103-4 and 109.
[372] The insuring clause is quoted at para 63 and the exclusion clause 5(e)(v) is quoted at para 66 {G/100/2011}.
[373] See para 80 {G/100/2016}.

construed as excluding damage caused in a particular way… the result is not the consequence of the application of a principle other than… the ascertainment and application of the contractual intentions of the parties."

371. Then at paragraphs 118-120 the Judge construed the indemnity as being intended to cover defence costs that arose from any non-excluded claim, and "*even if some investigation and defence costs can be seen to be referable to both a claim in respect of which there is an indemnity and a claim in respect of which there is not, the insureds are entitled to such costs because they fall into an indemnity*". In other words, even though the costs would have been incurred even but for the insured peril, because of the uninsured claims to which they were also referable, they were recoverable because proximately caused by ('arising from') the insured peril, as properly construed.[374] Thus an order was made permitting recovery of all costs of defending the 3 claims not brought about by fraud, without any need for a factual investigation of whether they would have been incurred anyway in defending the other 36 claims.[375] Colinvaux at para 5-096, after noting that *McCarthy* has since been applied in other Australian cases, merely states that Kiefel J's approach means that the existence of two causes, where one is excluded, is not necessarily fatal to a claim if the causes are independent of one another.[376]

372. This is a good illustration because it shows that, of course, the question is one of construction. Do the parties intend costs that were concurrently caused by the insured peril and the excluded peril to be covered? It does not depend upon the particular Australian view of the *Wayne Tank* principle: even if claims brought about by fraud were not excluded, but simply were not covered (i.e. a *Miss Jay Jay* not *Wayne Tank* case), the insurers would say that the but for test prevents recovery. The Federal Court rightly held that one needs to construe the parties' intentions, and here those costs are costs 'arising out of' the covered claims and it was intended that they be recoverable even though they would have been incurred anyway by virtue of the other not covered claims. Just as the parties may (or in another case, on the proper construction, may not) intend that BI resulting from landslip resulting from storm is recoverable even if it would have occurred anyway due to signal failure due to storm. The suggestion that this conclusion was not open to the Federal Court (as the insurers must say) should be rejected.

373. The textbooks relied on by MSAmlin at paragraph 69.2 of its Case do not assist it. *Riley* at paragraph 3.10 is about the trends clause and quantification machinery (as to which it is not disputed that a 'but for' test applies); *Walmsley* and *MacGillivray* rely only on *Orient-Express* for authority that a but for test applies; the *Clarke* references do not assist (paragraph 25-1 does not

[374] Explained at trial at Day2/32-5 {G/23/174}.
[375] Para 130 declaration 4 {G/100/2030}.
[376] {G/104/2147}.

say the but for test applies, and paragraph 25-6B discusses the application of the but for test to a negligence claim in tort). *Riley* paragraph 15.9 does say that proximate cause in insurance, contract and tort includes a but for test, but cites no authority and goes on to discuss contract and tort and legal causation.

374. Although it is not necessary for this Court to delve into the topic, the FCA does not accept that even outside the causation rules applicable to insurance there is some established two-stage causation test which requires the application of a 'but for' test as its first element. In *Fairchild v Glenhaven,*[377] Lord Hoffman made clear that causal requirements are creatures of law:

> "The same is true of causation. The question of fact is whether the causal requirements which the law lays down for that particular liability have been satisfied. But those requirements exist by virtue of rules of law. Before one can answer the question of fact, one must first formulate the question. This involves deciding what, in the particular circumstances of the case, the law's requirements are. Unless one pays attention to the need to determine this preliminary question, the proposition that causation is a question of fact may be misleading. It may suggest that one somehow knows instinctively what the question is or that the question will always be the same. As we shall see, this is not the case. The causal requirements for liability often vary, sometimes quite subtly, from case to case. And since the causal requirements are always a matter of law, these variations represent legal differences, driven by the recognition that the just solution to different kinds of case may require different causal requirement rules."

375. See also Lord Hoffmann's 2011 article on Causation"[378]

> "This account of the way in which the law employs causal (or indeed any other) concepts should explain why judges find it so difficult to understand why academics claim that the question of whether the causal requirements of some legal rule have been satisfied involves a 'two-stage process' in which you first decide whether the putative cause amounted to a 'cause in fact' and then, if it passes that test, whether it counted as a cause in law for the purposes of the particular rule. There is no agreement on what amounts to being a cause in fact. Professor Stapleton says that it means having some historical connection with the relevant outcome. Others are more exacting and prefer the NESS test: that it means being a necessary element in a set of conditions which are jointly sufficient to produce the outcome. But no judge in fact adopts a two-stage test. Of course the application of the legal rule is always a two-stage process in the sense that you find the facts and then decide whether they answer to the requirements of the rule, or (which comes to the same thing) you decide as a matter of interpretation what are the requirements of the rule, and then decide whether the facts satisfy those requirements. That is the natural process of decision-making when applying any legal concept. But that two-stage process is not what the advocates of 'cause in fact' or the NESS test have in mind. Their theory is that when you have ascertained the facts, you do not go straight to the question of whether they satisfy the requirements of the particular legal rule, having resolved any questions of interpretation which may be necessary to answer this question."

376. This is also reflected *Galoo v Bright Grahame Murray* [1994] WLR 1360, at 1374H.[379] In considering causation in contract, and reaching a conclusion that a breach of contract would only sound in damages if it were the dominant/effective cause of the claimant's loss and not merely given the opportunity for it to be sustained (so analogous to the proximate cause test),

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[377] Para 52 {E/17/344}.
[378] In Goldberg, *Perspectives on Causation* (2011) {G/120/2325}.
[379] {G/55/603}.

the Court of Appeal endorsed as representing English law a statement of the High Court of Australia in *March v E&MH Stramare Pty Ltd* (1991) 171 CLR 506 at 515 that (emphasis added):[380]

> "The common law tradition is that what was the cause of a particular occurrence is a question of fact which 'must be determined by applying common sense to the facts of each particular case' in the words of Lord Reid: Stapley v Gypsum Mines Ltd [1953] AC 663, 681…It is beyond question that in many situations the question whether Y is a consequence of X is a question of fact. And, prior to the introduction of the legislation providing for apportionment of liability, the need to identify what was the 'effective cause' of the relevant damage reinforced the notion that a question of causation was one of fact and, as such, to be resolved by the application of common sense. Commentators subdivide the issue of causation in a given case into two questions: the question of causation in fact – to be determined by the application of the 'but for' test – and the further question whether a defendant is in law responsible for damage which his or her negligence has played some part in producing: see e.g. Fleming, Law of Torts 7th ed (1987) pp. 172-173; Hart & Honoré, Causation in the Law, 2nd ed (1985) p.100. It is said that, in determining this section question, considerations of policy have a prominent role to play, as do accepted value judgments: see Fleming, p.173. However, this approach to the issue of causation (a) places rather too much weight on the 'but for' test to the exclusion of the 'common sense' approach which the common law has always favoured and (b) implies, or seems to imply, that value judgment has, or should have, no part to play in resolving causation as an issue of fact. As Dixon CJ, Fullagar and Kitto JJ remarked in Fitzgerald v Penn (1954) 91 CLR 268, 277 'it is all ultimately a matter of common sense' and 'in truth the conception in question (i.e. causation) is not susceptible of reduction to a satisfactory formula'."

377. Therefore, causation in law is always context specific (one has to identify the purpose of the inquiry and what the law's requirements are); the courts have a flexible approach – there is no formal two stage process of the kind posited by insurers; there is no requirement that one exclusively or universally applies the but for test - that kind of formalism, whilst advocated by academics, does not exist in the law; causal requirements are not autonomous expressions of some form of logic and they are not always applied in the same way.

E. PREVENTION AND HYBRID CLAUSES

Introduction

378. In considering prevention of access and hybrid wordings, the Court drew a distinction between:

    378.1. those it found responded to a wider event such as the COVID-19 pandemic (Arch, Ecclesiastical1.1-2 (assuming the exclusion did not apply), Hiscox1-4 hybrid, RSA1, RSA4 (prevention of access) and RSA4 (enforced closure), i.e. on which the FCA won in relation to this point of scope and causation; and

[380] {G/99/2040}.

378.2. those it found only responded to local occurrences of disease or other incident (Hiscox NDDA, MSAmlin1-3 (AOCA), RSA2, Zurich1-2), i.e. on which the insurers won in relation to this point of scope and causation.

379. The FCA does not appeal in relation to those on which it lost.

380. As to the insurers who lost on this point, Ecclesiastical does not appeal because it nevertheless won on an exclusion clause, and it is presumed that RSA does not appeal on RSA4 (prevention of access) or RSA4 (enforced closure) because it has decided it has no real prospects of success.

381. But Arch appeals its prevention of access clause, RSA appeals the RSA1 hybrid clause, and Hiscox appeals the Hiscox1-4 hybrid clause, the essence of the insurers' case being that (i) these clauses only cover local occurrences and/or (ii) insurers should not be covering losses that would have resulted had some of the elements of the insured peril (such as the COVID-19 emergency) still been present without the full composite insurance peril being present.

382. The relevant wordings are Arch, Hiscox1-4 hybrid, and RSA1.

383. The wordings must all be considered individually, but there is a common core of the construction/causation argument that applies to all of these, before the individual wordings are considered. For the purposes of this general discussion, its suffices to note the basic building blocks of the cover clauses:

	Loss	*In some cases: need for interruption*	*Interference in use of the premises*	*Public authority action*	*Underlying emergency/disease*
Arch (prevention of access clause)	"*loss… resulting from… Prevention of access to The Premises due to the actions or advice of a government or local authority due to an emergency which is likely to endanger life or property.*"				
	loss	-	resulting from prevention of access	due to actions or advice of government or local authority	due to an emergency which is likely to endanger life
RSA1 (hybrid clause)	"*loss as a result of closure or restrictions placed on the Premises as a result of a notifiable human disease manifesting itself at the Premises or within a radius of 25 miles of the Premises"*				
	loss	-	as a result of closure or restrictions	-	as a result of notifiable disease manifesting within 25 miles

			placed on the premises		
Hiscox1-4 (hybrid clause)	*"losses resulting solely and directly from an interruption to your activities caused by your inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority"*				
	loss	resulting solely and directly from interruption	caused by inability to use the premises	due to restrictions imposed by a public authority	following an occurrence of a notifiable infectious or contagious disease *Hiscox 4 only*: within one mile

The underlying event

385. None of the wordings are simply triggered by prevention of access due to actions of the government, i.e. without specifying the underlying events to which the authority is responding. (Even all risk property damage wordings include a number of exclusions that carve out certain underlying causes.)

386. Instead, all of these clauses specify an underlying cause to which the public authority is responding, in particular a notifiable disease or a dangerous emergency, in addition to specifying public authority action. This disease/emergency is specified as having to be the underlying cause of the public authority action by virtue of the specified causal connector between the underlying cause and the action (Arch: "*due to*" an emergency; RSA1: "*as a result of*" disease; Hiscox1-4 hybrid: "*following*" disease).

387. In other words, these are composite perils. This is developed further below. But what this also shows, importantly for construction purposes, is that these clauses all contemplate explicitly that the public authority is reacting to an external emergency in the world. What more can be discerned about the contemplated emergency depends upon the clause. For RSA1 and Hiscox1-4 hybrid there has to be notifiable disease, with all that entails (see the discussion above). Arch specifies that it is something that endangers life, i.e. a very serious emergency. Arch explicitly specifies 'government' action, i.e. expressly contemplates an underlying disease or incident dangerous or wide enough to engage the interest and action including legally-binding orders of the national government. But in general terms, the point is that in all the clauses there is a trigger that expressly contemplates (i) a public authority responding to (ii) a serious emergency.

388. In all such cases, it must be contemplated that the underlying emergency could or likely would itself cause loss to the business. This follows implicitly from the nature of such possible emergencies: simply put, diseases and emergencies cause reactions by for example customers, employees and business owners, whether or not the public authority intervenes.

389. Indeed, inevitably the emergency will be not only independent and external from the public authority action but pre-date it, since the public authority will take some time to react to the emergency (the disease outbreak, the fire, the public order emergency). It will be an emerging peril whereby the underlying event will occur then some time later (the time period depending on the nature and development of the emergency) the public authority will act—and if it does, the composite peril is complete and the cover triggered. (This has implications for the Pre-Trigger Peril Point, as discussed in the FCA's Appeal Case.)

390. Moreover, as set out above, it is in the parties' contemplation that:

390.1. The disease/emergency comprising the outbreak of the disease could spread widely including across the country and in unpredictable ways, including as a regional or national epidemic: Judgment [116, 132, 143-4, 160, 359, 370].

390.2. They may well lead to public authority reaction to the entire outbreak (not parts of it) and may require a broader than local response including a national one from the central government (i.e. above local authorities): Judgment [103-4, 138, 160, 228, 370].

391. These points follow from the nature of the cover, including the reference to notifiable disease. The insurers are keen to emphasise that COVID-19 and the nation-wide response is unprecedented,[381] and that there is no express reference to pandemics being covered.[382] But not only does this go too far (for example, the 21 and 26 March 2020 Regulations were made pursuant to notifiable disease powers in a statute dating back to 1984)[383], the FCA does not need to show that this particular disease and response was contemplated. The important point is that the parties can be taken to have contemplated wide area diseases/emergencies, in some cases leading to national or regional public authority response. Noting this does not involve the use of hindsight.[384] Indeed, that this is contemplated is clear on the face of the three clauses: the Arch emergency clause contemplates government action, and the RSA1 and Hiscox1-4

[381] Hiscox Appeal Case paras 14-15 {B/6/160}.
[382] Hiscox Appeal Case para 13 {B/6/160}.
[383] Judgment [14, 21, 34, 44, 103, 107]. The Public Health (Control of Diseases) Act 1984 which gave the Secretary of State power to make regulations "*with a view to the treatment of persons affected with any epidemic, endemic or infectious disease and for preventing the spread of such diseases*": Agreed Facts 5 {D/9/1530}.
[384] Contra Hiscox Appeal Case para 15 {B/6/160}.

hybrid clauses refer to notifiable diseases (with all that entails: see further paragraphs 138ff above). Nowhere do the insurers really grapple with this, preferring instead to seek sympathy on the basis apparently that while the parties could have foreseen epidemics with wide area public authority action they could not have had a pandemic with draconian legislation in mind. But COVID-19 is different in degree not in kind, and there is no basis for excluding it from cover.

392. It is, of course, possible to come up with examples where the emergency does not have any effect on the business beyond the public authority action. The insurers' ingenuity led to several such examples deliberately crafted so that the underlying emergency would not, without the public authority intervention, have affected the business:

392.1. Mr Gaisman QC for Hiscox gave the example of a suicide that took place at a flat above a shop or an adjacent building where a public authority then closes the business.[385] Leaving aside the unlikelihood of the public authority closing the entire business because of a suicide in a flat above it, the example is chosen because the business is not affected at all by the suicide, only by the public authority action.

392.2. Mr Kealey QC preferred the example of a jogger who was stabbed at the side of a road and did not block any road, and the police then cordon off the area.[386] It is was important to Mr Kealey that the jogger did not block the road, and only the public authority did: the example is crafted to ensure that the incident can have no effect on the business.

392.3. Mr Gaisman QC gives the example of food poisoning following which the customer complains to the authorities.[387] Again, it was important for Mr Gaisman to dodge the more typical example by which the restaurant itself learns of the food poisoning, as in that situation the restaurant would have acted even without public authority action. i.e. the poisoning has to be secret from the business, so that the public authority action is how the business learns of it rather than (as is much more common) postdates the business learning of and acting on the food poisoning.

393. But they are the outlying cases and not (as was strenuously argued at trial) 'the paradigm'.[388] The clauses contemplate that cover will usually (and in any case frequently) only arise when there is

[385] Day5/40-41 {G/26/195}, Day6/3 {G/27/202}.
[386] Day6/120 {G/27/204}.
[387] Day5/41 {G/26/196}.
[388] Day5/138-139 {G/136/2383}, Day6/3 {G/27/202}.

an underlying event that would itself have caused losses even absent public authority action. The more common cases are as follows.

394. Food poisoning, vermin or disease within the insured premises (rather than a flat above them). The Court addressed this at Judgment [281-2]:

> "281. In our view, the FCA effectively illustrated the fallacy and unreality of the insurers' case in relation to the counterfactual, with particular reference to the Hiscox "public authorities" clauses, by focusing on the provision of cover in respect of an inability to use an insured's premises, assumed to be a restaurant, due to restrictions imposed on them by the local authority following the discovery of vermin dislodged from a nearby building site. On the insurers' case, the counterfactual involved stripping out the restrictions, but assuming the vermin were in the premises throughout, with whatever other consequences on the business the presence of vermin would have had. Thus, on insurers' case the insured could not recover in respect of the period after the imposition of the restrictions, unless it could show that customers not coming to the restaurant was due to the restriction imposed rather than due to the vermin, and that if the insured could not demonstrate that customers would have come despite the presence of vermin, it could not recover. As the FCA submitted, this would render the cover largely illusory, as insurers would argue that, as no one is likely to want to eat at a restaurant infested by vermin, all or most of the business interruption loss would have been suffered in any event. Such illusory cover cannot have been intended and is not what we consider would reasonably be understood to be what the parties had agreed to.
>
> 282. Further and more specifically, not least of the difficulties with the insurers' case is that they did not adequately explain how, in the example we have just mentioned, the insured would demonstrate the reason why customers had not come, in circumstances where the effect of the restrictions was that the restaurant was closed and they could not come. It was suggested on behalf of insurers that it would be done by cross-examining customers as to their motives in not coming. Quite apart from the impracticality of such an exercise if dealing with a large number of customers, insurers provided no answer to how all the customers who had not come could be identified, given that, *ex hypothesi*, they had not come, and the restrictions had made it impossible for them to do so."

395. Hiscox's only answer is to argue bizarrely that this is "*inapposite and extreme*" and to contend that it is more likely that the vermin would be in the kitchen not the customer area, meaning that "*The customers would typically never have been aware of cockroaches in the kitchen but for the restrictions. In the paradigm situation, there will be no difficulty in the insured proving its loss, because it would be the closure itself which stopped the customers from coming.*"[389]

396. First, there is nothing atypical about the vermin/disease etc occurring in the public-facing areas of the restaurant and being learned of by customers. The Court's comments are entirely apposite, correct and Hiscox accepts it has no answer to them.

397. But, second, Hiscox fails here to recognise that, even if the customer does not learn of the vermin or disease, the restaurant owner will ordinarily have to close the restaurant or otherwise restrict its business. Hiscox in its next paragraph accepts this but says: "*the responsible restaurateur who closes his restaurant because of rats, without the need for public authority intervention, is not covered because*

[389] Hiscox Appeal Case para 67 {B/6/173}.

he has not bought insurance against this eventuality. This is not a question of rewarding an irresponsible insured and penalising a more responsible insured".[390] But, with respect, this fails properly to deal with the issues raised by Hiscox's own example:

397.1. The cover is illusory on the insurers' construction because most restaurateurs would close even absent public authority action. Hiscox surely does not suggest that a restaurant (which is obliged under the policy promptly to notify Hiscox of the problem[391]) would continue to cook from a kitchen containing vermin or disease? So in the ordinary case—posited by Hiscox itself—there will be a problem in proving loss and securing cover, contrary to Hiscox's assertion otherwise.[392] (And it is no answer to say, as Hiscox does,[393] that it might be illusory for restaurants but may not be for accountants, which would also have to close to avoid risks to employees.)

397.2. The exception is insureds who disregard risks to customers and employees (and would have continued to do so). For them there is cover, as it is only the gun to the head of a public authority closure order that stops the business operating, so all losses resulted from the public authority restrictions.

397.3. This also means that on insurers' case, every insured must prove that but for the public authority closure they would not have closed anyway and would have kept the problem a secret from customers (and so not deterred any custom).

397.4. These consequences therefore lead to the more reasonable construction that there is intended to be cover for all the effects of the vermin/disease etc, once there has been public authority restrictions, without the need to seek to perform the invidious and impractical exercise of extrication the one from the other.

397.5. Further, it is no answer to say that most typical claims will be for a shorter period of interruption. That points against, not for, the insurers' approach. Where a salon is closed for two days because of a murder, is it required to seek to prove what the footfall would have been as a result of the murder without the police closure?

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[390] Hiscox Appeal Case para 68 {B/6/173}.
[391] "*We will not make any payment under this section unless you notify us promptly of any damage or event which might prevent or hinder you from carrying on your activities*" (e.g. Hiscox 1 {C/6/404}) and "*We will not make any payment under this policy unless you give us prompt notice of anything which is likely to give rise to a claim under this policy in accordance with the terms of each section*" (e.g. Hiscox 1 {C/6/378}).
[392] Hiscox Appeal Case paras 67 and 74 {B/6/175}.
[393] Hiscox Appeal Case para 66.2 {B/6/173}.

398. The Buncefield and train delay due to landslip examples were explored above at paragraphs 115ff.

399. A key point is, therefore, that, as the Court found (Judgment [280]) (emphasis added):

> "Moreover, and importantly, the effect of the imposition of restrictions of the sort involved in the Hiscox "public authorities" clauses will invariably, or almost invariably, have the result of preventing the insured from seeing what would have been the effect of the emergency (whatever it was) in the absence of the restrictions. That is part of the very nature of such restrictions. We regard it as not being a reasonable interpretation of the parties' agreement that the insured could only recover to the extent that it could show what was the position which would have appertained without the restrictions, but on the basis that the situation which had led to those restrictions is assumed to have occurred, in circumstances where the insured has been put into an unusual situation by the emergency (and accordingly cannot rely simply on the ordinary results of its business) and where the effect of the restrictions will have been to render it impossible to say with any certainty what that position would have been."

This issue (of inextricability/impossibility/impracticability) is returned to below at paragraphs 442ff.

400. It would be open to the parties to provide that in that case the cover is only for the incremental amount by which the public authority action increased the losses that would have been suffered due to the underlying event (which is the insurers' case, although as set out below they are inconsistent and confused as to this). But that reading, which vastly reduces the value of the cover while also rendering it impossible or impractical to apply (see paragraphs 442-459 below), is much less reasonable than the construction by which once the composite peril is triggered there is cover for the entire combination including the full extent of the underlying event without any intention that the elements be separated out to look for the incremental amount by which the combination increased losses beyond those of particular elements. As the Court put it (Judgment [283]):

> "the correct application of the counterfactual in the current case is to compare the actual performance of the business with that which the business would have achieved in the absence of the COVID-19 outbreak which led to restrictions (as understood in the sense we have given above) and the inability to use the premises."

Composite perils: introduction

401. The starting point that these perils are 'composite' perils requiring all the elements, as found by the Court (Judgment [94, 309, 471, 531]), was accepted and advanced by the insurers including in their Joint Causation Trial Skeleton.[394]

[394] Insurers Causation Trial Skeleton paras 66 and 68 {G/11/121}, also Hiscox Trial Skeleton para 430.3 {G/8/70} and Zurich Trial Skeleton para 169(10) {G/15/146}.

402. The construction of the composite peril is important because it is agreed that the 'but for' test is applied in the trends clause to calculate what loss would have been suffered *but for the insured peril*[395] (and that those trends clauses specify an indemnity for losses which would not have occurred but for 'Damage' must be read as indemnifying losses but for the insured peril[396]). The insured peril includes the underlying emergency/disease. It is therefore something of a contortion (well beyond the ingenuity of the ordinary reasonable reader construing the policy) to conclude that one does not strip out the emergency/disease or any of it from the counterfactual, as well as being an uncommercial reading of the policies. But that is in general terms the insurers' position, although their positions are inconsistent internally and with each other.

403. The nature of the peril, and the contemplation of the indivisibility of the public authority action and the underlying disease/emergency, mean that on the proper construction of these wordings the entire disease/emergency must be stripped out.

Arch[397]

404. Arch's clause covers "*loss… resulting from… [C] Prevention of access to The Premises due to [B] the actions or advice of a government or local authority due to [A] an emergency which is likely to endanger life or property*."[398] Policies are taken out under this wording by businesses that are mostly in categories 2 to 5, with a very small number in categories 1 and 7 and none in category 6.[399]

405. Arch argues that the cover is for the losses which are the product of the "*causal sequence*": Arch Appeal Case para 28.

406. Arch argues that it is wrong to take out losses not resulting from the causal sequence (Arch para 28), i.e. losses resulting only from one element such as the emergency which would have arisen even if access had not been prevented (Arch paras 32-3).

407. This 'causal sequence' argument requires that at the least one must remove the government action or advice to the extent that it caused the prevention of access to the premises and the COVID-19 to the extent that it resulted in the government action or advice, i.e. at least some of all the elements of the causal sequence must be removed.

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395 Arch Appeal Case para 20 {B/4/105}, Hiscox Appeal Case para 83 {B/6/177}.
396 Arch Appeal Case para 25 {B/4/107}, Hiscox Appeal Case para 78 {B/6/176}.
397 The Judgment paragraphs on causation are Judgment [337-351].
398 {C/4/226}.
399 Judgment [307].

408. This requires a difficult question as to whether one must strip out the 21 and 26 March Regulations (where they resulted in the prevention of access) in their entirety? Or must one strip out only the Regulations applicable to the category of business to which the insured business belongs—e.g. if the insured business is a cinema, does one assume that the 26 March 2020 Regulations were still passed but excluding Regulation 4, or excluding Regulation 4(4) and Schedule 2 Part 2? Or does one assume that the Regulations were passed but with a legislated carve-out such that of all the pubs in the country only the insured's is immune and Regulation 4 and the rest of the Regulations otherwise applied as enacted? Similarly, there is the question of whether one must strip out the emergency (COVID-19) but only to the extent that it led to the relevant government action that prevented access to the premises. This question is also hard to answer and depends upon absurd investigations into, for example, what different pandemic would have led to Regulations applicable to all business other than cinemas.

409. At trial, Arch cherry-picked by accepting that the government action (here the Regulations) must be removed, as well as the prevention of access, although pleading in its Defence that disease must not be removed (emphasis added):[400]

> "the appropriate counterfactual scenario is where there was no insured peril, ie no government or local authority action or advice preventing access to the Premises, but where all other factors remain unchanged. Those factors include but are not limited to the following: (1) COVID-19 existed and was prevalent in all or most parts of the United Kingdom; (2) the various other official control measures remained in force, including the UK Government regulations and advice on social distancing, the "lockdown" and the requirement of self-isolation…"

410. This was correctly summarised at Judgment [337] (emphasis added):

> "Arch raise a point of principle in relation to how the trends provision operates, which, in broad terms, is whether in assessing what the performance of the business would have been had the insured peril not occurred, what is "stripped out" in the counterfactual assessment is only the government restriction (in the case of Arch "actions or advice") and its immediate effect (here the prevention of access) as the insurers contend, leaving as part of the counterfactual which would still have affected the performance of the business the coronavirus pandemic and its economic and social effect in the United Kingdom."

411. Thus (to use Hiscox's notation, working from the underlying event forwards in the consequential chain), if prevention is C, Government action is B, and emergency is A, Arch would strip out A but not B or C.

412. Arch has, presumably for tactical reasons and to avoid the difficult questions raised above, picked a different cherry for the appeal, by which the prevention of access must be removed but none of the government action or emergency: "*The language does not require the assumption that*

[400] Arch Defence paras 7.13 {G/17/150} and 50. Arch has an alternative case at para 7.16 that if all government action must be removed one can still leave in the counterfactual public reactions to and economic effects of COVID-19.

neither the government action or advice, nor the emergency, had occurred… what is reversed out in the counterfactual is the qualifying prevention of access only".[401]

413. It thus now removes 'C' only.

414. This argument is unavailable without amendment to the Defence quoted above at paragraph 409.

415. More importantly, this argument is held together with spit and sticky tape and cannot survive use or scrutiny. If the government action still existed in the counterfactual world completely untouched (e.g. including Regulation 4 of the 26 March 2020 Regulations closing cinemas) then how can there be no prevention of access for this particular cinema? (Although there the house of cards falls apart: if one takes out some of the government action, then what, and why not take out some or all of the emergency, as noted above?) And one also inevitably provides for a windfall benefit which cannot have been intended: Arch's counterfactual assumes that this is the only cinema to which access is not prevented <u>in the entire country</u> (Arch is very clear that the emergency and Regulations are assumed still to have occurred), in which case the insured business has not only lost its ordinary revenue but the unusual revenue it would have earned as a monopoly. Arch does not anywhere deal with these points, despite being advanced at trial.[402]

416. What Arch means to say is that the cover is for prevention of access, and that the requirements of government action and an underlying emergency are just adjectival but not really part of the insured peril. It owns up to that case when it says that the emergency is only the "*necessary first step in the specified causal sequence which leads to a covered prevention of access*"[403] and that the government action and emergency "*serve to identify the only circumstances in which insurers have agreed that losses caused by a prevention of access to the Premises are to be covered*".[404] This argument is really a case of Arch breaking ranks with the other insurers, and with its case at trial that there was a composite peril (see paragraph 401): it now says that the Court's acceptance of the insurers' own trial case that there was a composite peril was wrong[405] and the very concept of the composite peril is "*a*

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[401] Arch Appeal Case para 48-9 {B/4/113}, also 34 and 59, Arch Grounds para 3 {A/4/84}.
[402] FCA Trial Skeleton para 472 {G/5/36}. At trial Arch's position was set out in Annex C to its skeleton argument: "*The purpose of a counterfactual is to see what would happen if all remained unchanged but the triggering event (i.e. the closure order). In the FCA's example, the triggering event is not removed and various other elements of the facts are modified or ignored (e.g. social distancing requirements, lockdown and consumer confidence). The assumption is therefore that customers flocked to the <u>only</u> open restaurant in the country. Other factors such as those examples above, and the presence of coronavirus in the population, must be unchanged rather than ignored*" {G/6/48}. This does not explain why customers would not flock to the only open restaurant in the country.
[403] Arch Appeal Case para 37 {B/4/110}.
[404] Arch Grounds para 2 {A/4/83}.
[405] Arch Grounds para 1 {A/4/83}, Arch Appeal Case para 60(1) {B/4/116}.

hitherto unknown concept in insurance law",[406] because Arch does not like the logical consequence of the composite peril.

417. That logical consequence is that as the trends clause[407] is drafted to deal with Damage, and Damage must be replaced with the non-damage insured peril, the trends clause ends up providing (given the composite peril): "*The adjusted figures will represent, as near as possible, the results which would have been achieved during the same period had the [Prevention of access to The Premises due to the actions or advice of government due to an emergency which is likely to endanger life] not occurred.*"[408] That being the case, it becomes very hard, simply as a matter of the language of the clause, for Arch to argue that only the prevention of access must be removed and not any of the government action or the emergency. The normal reading would be that of the Court below, i.e. that the counterfactual is "*what the performance would have been had there been no emergency and thus no government actions or advice and no prevention of access to the premises*".[409] Arch merely asserts that the trends clause should be manipulated so as to give the results which would have been achieved had the prevention of access not occurred (but the underlying government action and emergency occurred) without explaining why or even addressing the manipulation required at all,[410] and also without addressing why an element of the specified peril (the emergency) could be a 'trend' or 'circumstance' (and which it is said to be) so as to engage the mechanism in the clause.

418. Further, Arch fails to engage with the construction arguments required to justify its construction as the better one than the FCA's. To make this argument, Arch would have to:

418.1. Explain why the parties would intend such narrow cover of these incremental losses despite it being contemplated that the underlying cause would be expected to have effects other than through the public authority action. In the Arch wording there is no geographical restriction and there is express reference to government action responding to an emergency dangerous to human life—i.e. the policy contemplates prevention of access to premises in cases of a much wider emergency likely to have impacted many other premises and the public beyond the prevention of access to the insured premises. It cannot have been intended only to cover the incremental amount by which the prevention of access by the authority made things worse for the insured business. Arch simply fails to consider the nature of the underlying peril (expressly relied on by the

[406] Arch Ground 1 para 2 {A/4/83}.
[407] {C/4/224-225}.
[408] Judgment [346].
[409] Judgment [347].
[410] Arch Appeal Case paras 48-50 {B/4/113}.

Court below at Judgment [348]), merely asserting baldly that the nature of the pandemic emergency does not dictate a different answer.[411]

418.2. Explain why if this was intended the policy did not say so more clearly. The effect Arch seeks to achieve could probably be achieved by providing recovery only for loss where there is no "*other cause or event contributing concurrently or in any other sequence to the loss*". Arch chose not to use such words, although using exactly those words elsewhere in the policy in its terrorism exclusion.[412] Arch does not engage with this point of the FCA, although it was made at trial.[413]

418.3. Answer the absurdity provided by overlapping cover. An underlying emergency (say an earthquake) might—the parties must have contemplated—lead to prevention of access by government action or order under the prevention of access clause considered here, but also: Damage to the premises (the primary BI cover), Damage to property in the vicinity of the premises that deters potential customers (extension 8), failure of Public Utilities and Telecommunications supplies (extensions 4-5). On Arch's approach, the customer with such an embarrassment of riches of triggered perils recovers nothing. But for the 'prevention of access' there would still have been damage to the property; but for the damage to the property the phones and electricity would still have been down; but for either of those things the neighbouring properties would still have been damaged reducing attraction. This (the problem that arose and was inadequately dealt with in *Orient Express:* see above paragraphs 80ff) demonstrates that the 'but for' test cannot be intended to apply to the prevention of access alone, but rather must apply to the broader emergency. Arch does not engage with this point in its Appeal Case (despite it being one made at trial[414]).

418.4. Explain what the commercial purpose of the government action and emergency qualifiers are and why the parties intended to cover prevention of access only when limited in this way. Arch does not engage with this question.

418.5. Explain why anyone would take out cover under which (on Arch's construction):

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411 Arch Appeal Case para 39 {B/4/110}.
412 Pages 11 {C/4/203} and 26.
413 FCA Trial Skeleton para 462 {G/5/35}.
414 FCA Trial Skeleton para 454 {G/5/33-34}. Arch's response to this at trial was that the insured can recover because all the operative causes would be insured (Arch Trial Skeleton Annex C), although relies on no legal principle to explain this and further ignores the fact that there would be uninsured consequences of the earthquake falling outside these insured perils which on Arch's case would prevent recovery.

(a) The cover is only really of value for secret emergencies: see paragraphs 392ff above.

(b) The more cautious and public-spirited the owner, the less the cover. If the insured closes its premises before being ordered to do so, or would have done so afterwards even without the order, then there may be no cover. If the insured is the sort of person who keeps going until legally required not to, then there is cover.

(c) The smaller the emergency, the less the cover. A very local emergency may have fewer effects outside the prevention of access. (Arch by its arguments attempts to rewrite the cover so that it only realistically applies to very small, local and minor emergencies endangering life—which is bizarre given that the clause contemplates government action.)

(d) The more belt and braces and wide-ranging the public authority in its response, the less the cover. (Any action by a public authority beyond prevention of access to the insured premises—for example, in the present case, subject to appeal, restrictions on movement—reduces the cover.)

418.6. Engage with the sheer illogicality and unreality of its counterfactual including the windfall point (see paragraph 415 above). The Judgment rightly noted that (quite apart from the practical reality) trying to separate the prevention from the pandemic was artificial as a matter of legal analysis.[415] All Arch feels able to say is that it is not artificial if the policy on its proper construction requires it, which fails to engage with the point that the artificiality points against Arch's construction of the policy in circumstances when Arch needs to pray in aid an interventionist approach to policy construction in the first place because the words it would require to make good its point are simply not there.[416]

418.7. Similarly, one might apply Arch's approach to this clause (and to property damage situations, set out in Arch's discussion of *Orient-Express*[417]) to the Arch property damage BI cover. There is BI cover indemnifying for "*any interruption or interference with the Business as a result of Damage occurring during the Period of Insurance by (1) any cause not excluded by the terms of the Property Damage and, or Theft Sections of Your policy. (2) a Defined Contingency to*

[415] Judgment [348].
[416] Arch Appeal Case para 43 {B/4/111}.
[417] Arch Appeal Case paras 55-7 {B/4/115}.

boilers or other equipment" where Damage is defined as "*Accidental loss or destruction of or damage to property used by You at the Premises for the purpose of the Business*." This would include, for example, a huge tree falling onto an insured's property's roof, crushing it and damaging the walls, and also blocking the road and entrance. (Indeed, falling trees is a Defined Contingency in the Arch policies.[418]) On Arch's approach, the counterfactual strips out the Damage but not its cause. So, presumably, Arch's loss adjuster would try to model what revenue would have been earned if the tree had fallen against the property's roof without damaging it and stayed there, propped up, but blocking the way. And what if the tree is embedded in the building? Where does the fallen tree fit in that counterfactual? Where there is a fire that starts at the property and within an hour causes such damage as to require the demolition and reconstruction of the building but continues to rage for 36 hours, is the loss adjuster to disallow BI cover until the fire was put out because even but for Damage there would have been a fire at and outside the property that would have closed the business? The FCA would say not. The loss adjuster assumes the tree never fell or the fire never occurred—she or he excludes the underlying cause (the fallen tree/the fire), not just the property damage, from the counterfactual. That is the realistic and non-artificial counterfactual. It is common sense, and therefore what the parties would understand to have been intended.[419]

418.8. Engage with the impracticality of the insured proving its losses on this approach (in the context of its £25,000 sub-limit). Arch does touch on this point—see below at paragraph 450.

419. In other words, Arch's short skeleton simply does not engage properly with the construction task required.

420. For the reasons given in this Case, by far the preferable construction is that where there is an emergency and it leads to government action leading to prevention of access then, in part because of the practical inextricability of all of these, all consequences of the emergency are excised from the counterfactual.

421. Or, to put it another way, when removing this composite peril one must (as a matter of construction) remove all elements of the combination *to their full extent, and not only to the limited extent that they caused the next element in the combination*. Arch says: "*Arch did not agree to indemnify the*

[418] {C/4/201}.
[419] This point too was advanced at trial: FCA Trial Skeleton para 480 {G/5/37}.

policyholder against all business interruption losses caused by the emergency in the event that the emergency led to government action or advice which led to the prevention of access to the Premises" (Arch Appeal Case para 37[420]). This mischaracterises the point the Court was making and the context of the dispute between the parties. Arch (in common with the other insurers) was seeking and still seeks to contend that the trends clause can be used to adjust the loss of revenue actually sustained by a business that was, for example, required to close by reference to whatever loss of turnover it would have sustained anyway because of the emergency. It was that question which was being answered against Arch by the Court. That is not giving free-standing cover for the emergency. On this example the business has been forced to close by the government action. It is simply excluding from the counterfactual what at best would be a concurrent cause of the loss on the basis that such a concurrent cause is a necessary element of the insured peril.

422. Arch argues that if there were cover for any prevention of access, howsoever caused, there would not be a composite peril and the counterfactual must involve stripping out only the prevention and not the underlying event.[421] There is no such all risks prevention clause (see above paragraph 385) but if there were, this would be an 'all risks' prevention of access cover that did include an underlying cause in the insured peril. This would either be implicitly because prevention of access like damage to a building (both are harms not perils) does not just occur spontaneously, (it always has a cause), or expressly, for example by the inevitable exclusions of some underlying causes as in an all risks property policy (for example, by inevitably excluding some causes of prevention. A non-excluded cause of prevention of access would be an insured fortuity just like the hurricane in *Orient-Express*, and would have to be stripped out of the counterfactual. On their proper construction neither the all risks prevention of access clause, or the emergency prevention of access clause, reduce the indemnity because loss would have resulted (or, more to the point, the insured cannot show that loss would not have resulted) from the underlying emergency even but for the prevention. Arch is therefore wrong to say that "*[o]n the Court's reasoning… the insurer of the more generous [all risks] wording would be permitted to exclude from its adjustment the consequences of the emergency or the government response. The loss would be adjusted as if only the prevention of access had not occurred.*"[422] That remains the position only on Arch and the insurers' construction of the wordings.

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[420] {B/4/110}
[421] Arch Appeal Case para 35 {B/4/109}, also Day5/161 {G/26/01}.
[422] {B/4/109}

RSA1 hybrid[423]

423. RSA1 covers "*loss as a result of closure or restrictions placed on the Premises as a result of a notifiable human disease manifesting itself at the Premises or within a radius of 25 miles of the Premises".*

424. RSA disagrees with Arch (strip out only prevention of access), and indeed agrees to some extent with the FCA and the Court below, as to the correct approach to the counterfactual. RSA's case is that one does strip out all of the elements of the insured peril to their full extent: "*it is sufficient to remove the disease within the specified proximity and any measure to contain it imposed (1) as a direct consequence of the local disease and (2) specifically upon holiday rental accommodation*".[424] In other words, on RSA's case one removes the disease within 25 miles in full, and not only to the extent that it caused closure or restrictions on the premises, and the closure or restrictions placed on the premises in full.

425. RSA agrees that the entire underlying cause must be removed, and its only argument relies on the fact that RSA1 includes a Relevant Policy Area and is the one that arises in relation to disease clauses above, RSA contending that "*it is not necessary to remove the national incidence of COVID-19*".[425] RSA treats the clause as a disease clause, and criticises the Court for not doing so.[426] RSA's appeal in relation to these aspects of the case (whether the cover is for the entire disease rather than only the local element; if the latter, whether the local element resulted in the national restrictions) are addressed above in paragraphs 298ff.

Hiscox 1-4 hybrid[427]

426. The Hiscox 1 clause covers "*losses resulting solely and directly from [D] an interruption to your activities caused by [C] your inability to use the insured premises due to [B] restrictions imposed by a public authority during the period of insurance following [A] an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority".*[428] Hiscox 2 and 3 are to the same effect (reading into those clauses the definition of "notifiable disease"). Hiscox 4 is also to the same effect save for the addition of the words "*within one mile of the business premises*". (The questions of what 'occurrence' means, or the argument in relation to the Hiscox 4 1-mile perimeter, are addressed below at paragraphs 468ff and above at paragraphs 305ff.)

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[423] {C/15/1129}.
[424] RSA Appeal Case para 75(b) {B/9/320}, also RSA Defence para 62 {G/19/162}.
[425] RSA Appeal Case para 77(e) {B/9/320}.
[426] RSA Ground 1 {A/4/83}.
[427] Hiscox1 {C/6/400-401}, Hiscox2 {C/7/431}, Hiscox3 {C/8/461-462}, Hiscox4 {C/9/498-499}.
[428] {C/6/401}.

427. Hiscox's approach is that the composite peril is a "*causal combination*".[429]

428. Hiscox's approach then points in two inconsistent directions:

428.1. On the one hand, Hiscox's approach is that it treats it as "*self-evident*"[430] that the cover is only for the consequences of the entire combination and not for any elements of the combination providing that the other elements have occurred to trigger cover. It therefore does not allow for (and denies the possibility for[431]) elements of the composite peril to be qualificatory or adjectival—necessary to trigger cover but not delimiters on the insured peril for the purposes of causation and assessing what is covered and what can amount to competing causes once the policy is triggered. Yet that is clearly the correct interpretation of some elements of trigger clauses, as explained at paragraphs 43ff above, adopted by the Court in relation to the disease clauses (as regards the Relevant Policy Area restriction). Further, and as the Court noted, to treat elements of the cover as qualificatory/adjectival does not rob them of commercial purpose or effect.[432]

428.2. On the other hand, Hiscox then concedes that nothing is 'self-evident' because it is a question of construction as to what is the "*core*" or "*predominating element*" of the insured peril because the elements in the combination do not always have "*equal weight*".[433] This sets Hiscox up for its own cherry-picking, although at least (unlike Arch) it engages with the construction question in which the FCA is also engaged as a means of doings so (albeit reaching the opposite conclusion).

429. The cherry Hiscox prefers as being the 'core' of the Hiscox1-4 peril is the restrictions imposed.[434] Indeed, it even pleads that "*it is the restrictions causing the interruption which matter. It is therefore incorrect to treat the cover as 'premised' on disease*".[435] (Inexplicably, however, for Hiscox 4 the "*stipulated peril*" is also/instead said to be the occurrence of the disease with no mention of prevention, as suits Hiscox in relation to that separate part of the argument.[436])

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[429] Hiscox Appeal Case paras 30-1 {B/6/164}, 42, 46, 49-51, 54, 57-8, Hiscox Ground 1 {B/6/163}.
[430] Hiscox Appeal Case para 31 {B/6/164}.
[431] Hiscox Appeal Case para 71 {B/6/174}
[432] See paragraph 43 and 174ff above.
[433] Hiscox Appeal Case paras 32-4 {B/6/165-166}.
[434] Hiscox Appeal Case paras 34-35 {B/6/165-166}.
[435] Hiscox Defence para 96 {G/18/156-157}.
[436] Hiscox Appeal Case para 124 {B/6/188}.

430. Hiscox's approach to the counterfactual differs from both Arch (strip out prevention of access only) or RSA/the FCA/the Court (strip out all elements to their full extent, thus the full disease element).

431. *Disease:* Hiscox starts off with the logical approach for a combinationist of saying that one must strip out of the counterfactual all the elements but each only "*insofar as*" it leads to the next element.[437] Thus one does (*contra* Arch) strip out the underlying cause element (A), the COVID-19 outbreak, although insofar as it leads to restrictions imposed (B), but not (*contra* RSA[438]) other consequences of the disease.[439] (Hiscox does not in fact do this, or explain what it means or how it could be done. See below paragraphs 433.1 to 433.2.)

432. *Restrictions:* But that is where Hiscox abandons even its own logic, or else recognises the practical impossibility of its approach. According to Hiscox the 'core' of the peril is the restrictions imposed by the public authority (B).[440] What is unclear (even now, after a two week trial and lengthy Appeal Case) is what this means for Hiscox:

432.1. Does it mean that one strips out the entirety of the restrictions imposed by the public authority (B), i.e. not only 'insofar as' they led to an inability to use the insured's specific premises? If so, does this mean one strips out the entire set of Regulations? Hiscox seemed to accept this latter option in its Defence (emphasis added):

> "The correct counter-factual (in answer to the question "what would have happened but for the insured peril?") is, broadly, losses caused by COVID-19 and its impact on the economy and public confidence and government measures, but subtracting the insured peril(s), i.e. the mandatory government regulations or orders causing an interruption because of denial of or hindrance in access and/or inability to use."[441]

See also Hiscox's Appeal Case para 40, which emphasises that one strips out the consequences of the restrictions imposed, not the consequences of COVID-19 to the extent that they went beyond those restrictions; paras 62-63 which explain that for the counterfactual (emphasis added), "*[t]he parties' agreement as to the insured peril requires that a distinction be drawn between "restrictions imposed", i.e. matters which are mandatory and have the force of law, and any other type of public authority action*"; para 64 which emphasises that one "*removes mandatory measures but leaves in place all other consequences of COVID-19*"; and para 85 which

[437] Hiscox Appeal Case paras 39 {B/6/167} and 42, also 21.1.
[438] RSA only strips out the disease within 25 miles not the entire pandemic, but that is because the express words specify an underlying cause of disease within 25 miles, in contrast with the underlying cause for Hiscox of the disease without any area limit for Hiscox 1-3; RSA and Hiscox's approach remain directly inconsistent because RSA does not seek to take out the 25 mile circle of disease only to the extent that it causes the closure or restrictions.
[439] Hiscox Appeal Case paras 39 and 41-2 {B/6/167}, Day5/145 {G/26/200}.
[440] Hiscox Appeal Case paras 32-42 {B/6/165-167} and 69.
[441] Hiscox Defence para 23 {G/18/154}, also 117.

states that the policy "*do[es] not insure the consequences of the pandemic's economic and social effects, but only the consequences of the public authority "restrictions imposed"…*". This is what the Court understood Hiscox to contend for at trial (Judgment [265] penultimate sentence).

432.2. Or does it mean that one only strips out the restrictions insofar as they led to an inability to use the premises themselves (not other premises) (C)? Although Hiscox's emphasis is on not stripping out parts of COVID-19 (rather than on what parts of the restrictions are not stripped out), this would seem to follow logically from the causal combination argument as advanced by Hiscox, and may be what Hiscox means in its Appeal Case para 39 when it says fairly clearly although not repeated anywhere else:

> "For clarity of exposition at this stage, the elements in the peril "downstream" of the restrictions imposed are left out of account, but the same analysis applies to them: each successive causal element in the chain acts as a potential filter, reducing the loss which flows from the first element in the chain taken on its own."

But if that is the case, what does Hiscox mean by emphasising that on its case 'restrictions imposed' is the 'core' of the peril? What does that privileged position translate into for the purposes of the counterfactual?

433. The reason why Hiscox's case is unclear is that Hiscox—despite elsewhere asserting that its counterfactual is practical and not artificial—deliberately avoids engaging with the difficult question of exactly what the counterfactual is, because of the obvious and unattractive problems that question immediately throws up. For example:

433.1. Given that on Hiscox's case, COVID-19 must be stripped out ("*[i]t has to be removed too"*)[442] insofar as it was the cause of public authority restrictions, what does this mean and how does the insured and loss adjuster do it? Does one have to ask how much of the pandemic led to the legislation, or to the particular Regulations that closed down the insured's particular business? Does that mean identifying the Government's threshold—what amount of pandemic would have been just insufficient to have caused the Government to impose a lockdown? And presumably it is then necessary somehow to model what the other effects of that smaller pandemic would have been, absent the restrictions: what would the public, economic, and business's reaction have been?

433.2. Hiscox carefully avoids even touching on this, and its statement that one strips out some of the pandemic seems to be only lip service to logic, hence elsewhere the unqualified

[442] Hiscox Appeal Case para 39 {B/6/167}.

statement "*[t]here is therefore no justification for subtracting from the counterfactual the underlying causes of the restrictions, be it disease…*".[443] Hiscox then gives itself away: "*one simply asks what the position would have been but for the… restrictions (in the present case)*".[444]

433.3. Moreover, causation does not work like this: an underlying event that causes a public authority action does not only need to go so far but no further to cause it. The underlying event was a proximate and but for cause of the public authority action but there is no principle of law, logic, construction or otherwise that mandates trying to work out how much of the underlying event caused the public authority action, still less can the parties be taken to have agreed such a thing. Thus once it is accepted that one must remove the pandemic insofar as it caused the restrictions, the argument is lost for Hiscox as that must mean removing the pandemic.

433.4. If on Hiscox's approach one strips out the entirety of the restrictions, then is this all of the Government's action nationwide[445] (which the Court accepted was an indivisible whole: Judgment [111, 134, 532])? Or is it the entirety of (e.g.) the 21 and 26 March Regulations only, or only the particular Regulations applicable to this insured's business (although they are interwoven in their drafting with the rest of the Regulations)? Further, how is this consistent with the 'causal combination' approach, as it means that the cover is for all the consequences of the restrictions imposed by the Government, not only the consequences by virtue of the effect in making the insured premises unable to be used. It is not limited to the Regulations *insofar as* they caused the insured premises in particular to close down. This is what Hiscox complains that the FCA does, it is merely that the FCA construes the cover as extending for causation purposes to all the effects of (A) (COVID-19) rather than (B) (Government actions). Thus Hiscox is implicitly accepting that one cannot have absurd and unrealistic counterfactuals, slicing up and re-writing Government actions, just as the FCA says that one cannot slice up and re-write the pandemic that occurred.

433.5. If, alternatively, on Hiscox's approach one only strips out the Government restrictions insofar as they caused an inability to use the insured's premises then, as set out above in relation to Arch (paragraph 408 and the cinema), must one strip out only the Regulations applicable to the category of business to which the insured business

[443] Hiscox Appeal Case para 41 {B/6/167}.
[444] Hiscox Appeal Case para 92.3 {B/6/179-180}.
[445] Zurich was perhaps clearest at trial. See Zurich Trial Skeleton fn 149: "*it is the nationwide application of the Regulations which prevent access which falls to be removed*" {G/133/2380}.

belongs, but that begs a lot of questions, all of which would lead to absurd investigations into, for example, what different pandemic would have led to Regulations applicable to all business other than cinemas.

433.6. Further, at least on this latter case, what is Hiscox's stance in relation to the windfall profits issue? Does it accept that its counterfactual provides that the insured business (or possibly type of business, depending upon Hiscox's counterfactual) are the only businesses able to be used in the entire country, in which case the insured business has not only lost its ordinary revenue but the unusual revenue it would have earned as a monopoly? Hiscox does not anywhere deal with these points, despite being advanced at trial. It has not distanced itself from the Joint Trial Skeleton on Causation, which discussed the windfall profits issue and did not criticise it.[446]

434. The majority of Hiscox's argument on construction is merely assertion that Hiscox did not agree to insure the consequences of A save to the limited extent that B resulted from it, i.e. did not agree to insure the consequences of A provide B resulted from it.[447] But that assumes what must be shown by reasoned argument as to the proper construction of the contract. This is not transforming the peril by the 'back door',[448] it is construing the policy. Further, once all the elements are present, giving *prima facie* cover for all losses resulting from A (COVID-19) does not entirely remove the causative relevance of the other elements.

435. What Hiscox does not do, is engage with the nature of the peril—the central point as to the disease and public authority action always being contemplated to overlap, but with the disease having a broader scope for effects: see paragraphs 385 to 400 above.

436. As to Hiscox's minor textual arguments, which seem to be geared towards indicating that restrictions imposed are the 'core' of the peril:

436.1. The name of the 'public authority' clause is of no consequence other than as a convenient summary to locate the clause.[449] The public authority restrictions are the repeated element for the various underlying causes of murder or suicide, notifiable disease, food poisoning, defective drains, and vermin or pests. Using public authority as a title was convenient, whereas for bomb threat (where there also must be an inability

[446] Joint Skeleton Argument on Causation para 58.5 {G/11/119-120} and fn 82.
[447] E.g. Hiscox Appeal Case paras 49-53 {B/6/169-170}. The liquid analogy in para 53, which was raised at trial in oral submission by Mr Gaisman QC, assumes what is seeks to prove and does not allow for the possibility of parts of a clause that are conditions of cover but do not limit the peril for causation purposes. Thus, for example, the analogy cannot deal with the qualifying condition of the disease being notifiable (see paragraph 43 above).
[448] Hiscox Appeal Case para 55 {B/6/170}.
[449] Contra Hiscox Appeal Case para 34.1 {B/6/165}.

to access premises due to a restriction imposed) it tells more about clause 4 to entitle it 'bomb threat' (the single underlying cause in that clause) than 'police or the British Armed forces' (the authority imposing the restrictions).

436.2. The 'core' of the peril cannot be discerned from parsing or its syntax. The 'restriction' is neither the "*centre of gravity*" nor the "*pivot*" of the clause.[450] Being the middle element in the chain does not give it any privileges.[451]

437. The Hiscox trends clauses in the property BI sections vary but many state materially "*the amount that we will pay will reflect as near as possible the result that would have been achieved if the insured damage had not occurred*".[452] A number have been adjusted for non-damage clauses, and refer to the result if the '*insured damage or restriction had not occurred*',[453] '*insured damage, insured failure or restriction had not occurred',*[454] or even '*if the insured damage, insured failure, cyber attack or restriction had not occurred*'.[455]

438. The Court found[456] and the FCA does not appeal that such of these clauses as refer only to insured damage in this way would be intended to refer to damage 'or restriction' (or the other types of non-damage event), to allow for the non-damage BI extensions.[457]

439. It is not disputed that whatever term is used, it is (as Hiscox said at trial and the Court found) shorthand for the insured peril and could be replaced by writing out the insured peril in longhand.[458] It is therefore not disputed that the trends clause is intended to give effect to such composite insured peril as is identified above (so, the FCA says and the Court found at Judgment [278] the full composite elements including the full COVID-19 outbreak, and Hiscox says the COVID-19 outbreak only insofar as it caused the public authority restrictions).

440. The trends clause therefore does not add anything.

441. It is convenient at this point to touch upon an argument Hiscox advances[459] that the use of the term 'restriction' in the trends clauses and definition of indemnity period[460] shows that the core

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[450] Hiscox Appeal Case para 34.2-3 {B/6/165}.
[451] The further argument at Hiscox Appeal Case para 34.4 {B/6/165-166} is dealt with below at paragraph 441.
[452] {C/6/404}.
[453] Hiscox2 {C/7/432}.
[454] Several of the Hiscox2 wordings before the Court below had this wording, such as Professions BI – 6001.
[455] Hiscox4 {C/9/500}.
[456] Judgment [276].
[457] Indeed, even in the Hiscox1 wordings which refer only to 'insured damage', the Underinsurance clause {C/6/404} refers to "*insured damage, insured failure, loss of licence or restriction*".
[458] Hiscox Trial Skeleton para 389 {G/8/66}, Judgment [276].
[459] Hiscox Appeal Case para 34.4 {B/6/165-166} and 86.
[460] {B/6/165}.

of the public authority peril is the restrictions imposed. This is placing on the term weight it cannot bear. The term 'restriction' is used (alongside 'damage', 'failure', 'loss of licence' and 'cyber attack') as a shorthand for various perils. 'Restriction' captures BI cover clauses 4 (bomb threat) and 13 (public authority) and it is accepted by Hiscox that it is a convenient shorthand for the full peril.[461] It therefore does not indicate anything insightful about the 'core' of the peril or how it should be applied when calculating the indemnity counterfactual.

Inextricability, impossibility and impracticability

442. An essential point relevant to construction here is the commerciality of the various constructions, and whether they are workable.

443. A key point advanced by the FCA, and accepted by the Court after hearing argument for several days and looking at evidence of the progress of the disease and the Government and other reactions to it, was that these elements were inextricably linked and could not be separated for the purposes of the loss adjustment/indemnity quantification that would be necessary on the insurers' case.

444. This point rightly held considerable force in the Court's reasoning (quoting from the Judgment, emphasis added):

> "*[As to Hiscox]* 279. We do not consider that it would give effect to the intentions of the parties for the assumption to be that there were no mandatory government restrictions and no inability to use the premises as a result specifically of such restrictions, but that the national outbreak of the disease and other governmental responses to it, and the economic and social consequences of these, were assumed to have been the same as occurred. That would not, in our judgment be how a reasonable person would understand what was agreed. It would involve an unrealistic and artificial exercise, and one which fails to recognise that the occurrence of the disease is an essential element of the insured peril, and of what the insured has covered itself against.
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> 280. Moreover, and importantly, the effect of the imposition of restrictions of the sort involved in the Hiscox "public authorities" clauses will invariably, or almost invariably, have the result of preventing the insured from seeing what would have been the effect of the emergency (whatever it was) in the absence of the restrictions. That is part of the very nature of such restrictions. We regard it as not being a reasonable interpretation of the parties' agreement that the insured could only recover to the extent that it could show what was the position which would have appertained without the restrictions, but on the basis that the situation which had led to those restrictions is assumed to have occurred, in circumstances where the insured has been put into an unusual situation by the emergency (and accordingly cannot rely simply on the ordinary results of its business) and where the effect of the restrictions will have been to render it impossible to say with any certainty what that position would have been.
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> […]
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> 282. Further and more specifically, not least of the difficulties with the insurers' case is that they did not adequately explain how, in the example we have just mentioned, the insured would demonstrate the reason why customers had not come, in circumstances where the effect of the

[461] Hiscox Trial Skeleton para 389 {G/8/66}.

> restrictions was that the restaurant was closed and they could not come. It was suggested on behalf of insurers that it would be done by cross-examining customers as to their motives in not coming. Quite apart from the impracticality of such an exercise if dealing with a large number of customers, insurers provided no answer to how all the customers who had not come could be identified, given that, *ex hypothesi*, they had not come, and the restrictions had made it impossible for them to do so.
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> […]
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> *[As to Arch]* 348. In our judgment, this approach to the counterfactual question raised by the trends provision is not only correct on the true construction of the policy wording but accords with commercial and practical reality. We agree with Mr Edelman QC that the approach advocated by the insurers of stripping out the government restrictions etc. and their immediate effect, such as, in the case of the Arch wording, prevention of access, whilst leaving the pandemic and its economic and social effects is entirely artificial and ignores the inextricable connection between the various elements of the insured peril, both as a matter of legal analysis and as a matter of practical reality, given the nature of the pandemic emergency. For reasons elaborated in more detail in Section G of the judgment dealing with causation, we do not consider that 'but for' causation, upon which insurers placed considerable reliance, requires a different result, if it is relevant at all, given our conclusion as a matter of construction of the policy wording.
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> […]
>
> *[as to Ecclesiastical]* 388. That the counterfactual is one where all the elements of the insured peril are removed, not just the prevention or hindrance but the government action and the emergency and its economic and social effects, is not only the correct construction of the policy wordings, but accords with commercial and practical reality. As noted above in respect of Arch, the insurers' approach is an artificial one which ignores the inextricable connection between the various elements of the insured peril, both as a matter of legal analysis and as a matter of practical reality, given the nature of the pandemic emergency.
>
> […]
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> *[as to RSA]* 476. Here, as we have said, the insured peril is interruption or interference to the Insured's Business as a result of the actions or advice of…governmental authority…in the Vicinity of the Insured Locations which prevents or hinders the use of or access to Insured Locations during the Period of Insurance. The approach which RSA advocates involves a totally unrealistic and artificial counterfactual which assumes that the part of the government actions or advice which relates to the insured premises and their vicinity is stripped out but the nationwide actions and advice remain somehow the same. The fallacy in this approach is that the actions and advice in so far as they affect the insured premises and their vicinity are inseparable from the nationwide actions and advice. They are one and the same. The only way of establishing what the insured's business would have achieved if the Covered Event (here the Prevention of Access-Non Damage peril insured) is to strip out all the prevention and hindrance and all the actions and advice, in other words to assume that there had been no COVID-19."

445. These points are straightforward and unanswerable: (i) the elements of the composite peril, including the disease and public authority action, are "*inextricable*" and "*inseparable*", *"they are one and the same*", (ii) it is therefore "impossible" and "impractical" to separate them out, (iii) as well as being "artificial" to do so, and (iv) this follows from the nature of the composite peril—not only a pandemic emergency but also any emergency on which is overlaid public authority restrictions as these clauses require—and so was within the contemplation of the parties, so (v) the reasonable person would not understand this to have been intended. Speaking on behalf of all insurers, Mr Kealey QC in his oral submissions said that if it was not possible to extricate

the effects of COVID-19 and the closure (which, he accepted, was or might be difficult or impossible), then the policyholder would not recover.[462]

446. The insurers carefully avoid engaging with the detail of the practical difficulties (perhaps wary that their one suggestion, that after closure the customers of a restaurant who might have attended could be cross-examined as to whether they would have attended absent the closure was effectively undermined in the Judgment[463]):

447. **First**, the context is a small business insured and standard form policies: the example on the policy supplied by Hiscox is a "bike repairer and retailer".[464]

448. **Second**, the policies are subject to modest sub-limits which for Arch is only £25,000, for Hiscox1-4 £100,000 (the cost expert evidence contemplated by insurers to be required would be a significant proportion of those sub-limits), and for RSA1 is £250,000.

449. **Third**, the insured could expect to have to provide accountancy evidence as to earnings trends, advertising costs, and the business effects of ordinary business matters. Indeed, the policies expressly permit recovery as part of the BI cover of the reasonable professional accountant's charges for producing evidence required by the insurer to adjust and settle the indemnity claim.[465] Crude though it may be, the parties have provided for a simple calculation focusing on the indemnity period turnover versus the prior year which, subject to accounting adjustments based on business figures and trends, gives rise to a (relatively modest) sum to be paid for loss arising out of the emergency.

450. The exercise (and ultimately probably disputed arbitration) contemplated by the insurers is something else, some sort of sophisticated modelling exercise that neither the SME policyholder nor the loss adjuster are equipped to conduct or could proportionately afford. This might involve seeking to model how people would have behaved without public authority action; and how the public authority would have behaved without its public authority action. This might require experts on government responses to disease, experts on customer behaviour, predicting human behaviour based on statistics, economics, psychology and other expertise. Even after probably hundreds of thousands of pounds of expert and other investigation and a disputed arbitration this would be almost certain not to produce a reliable answer. Arch contends that it is a "*perfectly ordinary example of adjustment*"[466] but this is just irrational denial and wrong.

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462 Day4/87-92 {G/25/190}.
463 Day4/57-60 {G/134/2381}, Judgment [282].
464 {C/6/360}.
465 Hiscox1 {C/6/403}, Hiscox2 {C/7/432}, Hiscox3 {C/8/461}, Hiscox4 {C/9/500}.
466 Arch Trial Skeleton para 89 {G/6/40}.

451. This is very similar to the exercise insurers conducted in *The Silver Cloud* that was both expensive and unhelpful to the Court and resoundingly failed (by the Court's assessment) to separate the inseparable motivations acting on individuals' minds in response to a danger:

IF P&C Insurance Ltd (Publ) v Silversea Cruises Ltd, The Silver Cloud [2004] EWCA Civ 76, [2004] Lloyd's Rep 696 CA[467]

451.1. A luxury cruise operator claimed under a BI policy after the 9/11 terrorist attacks under section Aii which indemnified against "*Loss [of anticipated income] resulting from a State Department Advisory or similar warning by competent authority regarding acts of war, armed conflict… terrorist activities, whether actual or threatened*" that impact future customer bookings or necessitate changes to the itinerary of future cruises attached to the policy.[468] The claim arose out of US State Department warnings issued on 12 September and onwards[469]. The Aii cover had a US$5m limit.[470] (There was also an Ai cover section which included cover for loss of income as a consequence of acts of war, terrorism etc whether actual or threatened.[471])

451.2. It was obvious and found that as a result of the attacks "*and the warnings which followed*", many of the insured's actual/potential customers (principally but not exclusively wealthy American citizens) would be inhibited from taking cruises.[472] It was common ground that the 9/11 attacks and the warnings were concurrent causes of the downturn in bookings[473], but the insurers sought to argue, with expert support (from an MIT professor of management science) using empirical evidence (although not from actual experiments), that 80-90% of the causal effect was attributable to the terrorist attacks, and only the remainder to the State Department warnings.[474]

451.3. The trial Judge (Tomlinson J as he then was) rejected that argument because, as summarised at para 99 of the Court of Appeal judgment: "*[i]t is simply impossible to divorce anxiety derived from the attacks themselves from anxiety derived from the stark warnings issued in the immediate aftermath*", identifying as inextricably linked the attacks, media coverage of the

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[467] {E/19/422}.
[468] Quoted in the Court of Appeal judgment para 12 {E/19/451}.
[469] As summarised in para 37-38 {E/19/432}.
[470] The insured argued that the limit was US$5m per vessel but this was rejected: para 86 {E/19/440}.
[471] This related to loss of income as a consequence of terrorist interference with particular voyages of particular vessels causing loss of time: see CA paras 74-75 {E/19/438} and 77 and 110-111. The limited possibility of overlap is discussed at CA para 113.
[472] 1st instance [2004] Lloyd's Rep IR 217 para 9 {E/18/402}.
[473] 1st instance para 69 {E/18/420}
[474] Court of Appeal judgment para 98 {E/19/442}, 1st instance judgment paras 67-68 {E/18/420}.

attacks, post-attack Government warnings, and media dissemination of those warnings.[475] As Rix LJ observed on appeal: "*[i]t would seem therefore that he found that the deterioration in Silversea's market was inextricably caused directly both by the warnings and by the events themselves.*"[476] (Tomlinson J also held that as a matter of construction one could not regard separate warnings as distinct occurrences because it would be impossible to distinguish the causal effect of the different warnings.[477]) This was not challenged on appeal.[478] Further, Tomlinson J held that as there were concurrent causes, and none of them were excluded (the *Miss Jay Jay/Wayne Tank* point) a claim under the policy must lie.[479]

451.4. Pausing there, the first key aspect of the decision is that in a case of a peril of "*Loss resulting from a State Department Advisory or similar warning by competent authority regarding … terrorist activities*" the public authority warnings were regarded as inextricably linked with the underlying terrorist attacks, and it was impossible and impermissible to seek to argue (as the insurer had) that some losses were not caused by the public authority action because they would have occurred anyway by reason of other consequences of the terrorism. The Court and insurers both saw this as a decision on its facts,[480] which to an extent it was, but at the very least: (i) it is authority for the legal propriety of ruling that the underlying event and the public authority action in a public authority clause are inextricably linked and so to be treated as a single cause, (ii) this extends to the Pre-Trigger Peril point (the terrorism pre-dated the public authority warnings), (iii) it is the case factually closest to the present (much closer than the *Orient-Express* case, which was a damage cover rather than a public authority cover). Indeed, the case for inextricability in the present case is stronger, as in the instant case the underlying disease/emergency is expressly referred to as having caused the public authority action, whereas in *The Silver Cloud* the underlying terrorism (i) will often post-date the public authority action (the cover is for state warnings not reactions to past terrorism), and (ii) may never happen (the cover is for actual or threatened war, terrorism etc).

[475] 1st instance judgment para 68 {E/18/420}
[476] Court of Appeal judgment para 99 {E/19/442}.
[477] 1st instance judgment para 66 {E/18/419}.
[478] Court of Appeal judgment para 100 {E/19/442}.
[479] 1st instance judgment para 69 {E/18/420}, Court of Appeal judgment para 100 {E/19/442}.
[480] Judgment [534], and see MSAmlin Appeal Case para 113 fn 54 {B/7/249-250}.

451.5. The disagreement between the FCA on the one hand and the Court and insurers on the other is as to the extent to which the decision is of significance beyond that inextricability point. The point arises as follows:

451.6. On appeal, the insurers sought to rely on an exclusion of relevant losses "*unless as a direct result of an insured event"*,[481] contending that the loss was not directly caused by the warnings because losses were caused by the underlying terrorism[482] (although agreeing without prejudice to that to meet the Aii cover up to the US$5m limit[483]). This was issue iv: "*[a]re market losses due to 9/11 itself excluded, even though also due to government warnings*?" .[484] Rix LJ resolved this in the insured's favour at paras 103-4 (emphasis added and numbering added):

> "103. Both parties, however, submit that the application of these principles produces a result in their favour respectively. Mr Swainston submits that the 9/11 events themselves, because a direct cause of the losses different from the "insured event" under cover Aii, which has to be a warning, are excluded perils, and that losses caused by such perils are excluded losses. Mr Flaux, however, submits that the events of war or terrorism which lead to warnings are not excluded perils, but are perils covered elsewhere within the policy and are a necessary precondition, actual or threatened, of the warnings within cover Aii itself.
>
> 104. In my judgment Silversea are right about this. {1} Cover Aii is **premised on** acts of war, armed conflict or terrorist activities, actual or threatened, **provided,** however, that they generate the relevant warnings about them. **If they do, and those warnings cause loss of income as their direct result, there is cover. The underlying causes of the warnings are not excluded perils, it is simply that they are not covered under cover Aii as perils in themselves. Something extra is required**. {2} **However, they are "an insured event" for the purpose of the contract as a whole.** {3} **There is no intention under this policy to exclude loss directly caused by a warning concerning terrorist activities just because it can also be said that the loss was also directly and concurrently** caused by the underlying terrorist activities themselves."

451.7. This is not a statute, but it is an important paragraph in a short but relevant judgment of the Court of Appeal, and it deserves unpacking, hence the numbering inserted above.

451.8. It is correct (as insurers argued at trial) that the resolution of this issue, set out in {2}, appears to be that the arguments of Flaux QC (as he was) set out in paragraph 103 were accepted and on the proper construction of the exclusion clause (which applied to all sections), any loss that is a direct result of an event insured anywhere under the policy, was not excluded, even where the claim was not made under the section in which the

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[481] Quoted in Court of Appeal judgment paras 27 {E/19/430} and 97 {E/19/442}. Can be seen *in situ* in 1st instance judgment para page 223 {E/18/398}.

[482] Court of Appeal judgment para 101 {E/19/442}. The argument had not been raised below: see Court of Appeal judgment para 28 {E/19/420}.

[483] Court of Appeal judgment para 105 {E/19/443}. The insured had argued that the limit for Aii was greater than US$5m, hence the insurer deployed the exclusion clause argument in case it was wrong about that, but it was found that the limit was indeed US$5m (Court of Appeal judgment paras 80-86){E/19/439-440} so the insurer effectively waived the exclusion argument despite winning it.

[484] Court of Appeal judgment heading above para 97 {E/19/442}.

event was an insured event. Terrorism is an insured event under section Ai and that sufficed to prevent the exclusion operating even on the claim under section Aii.

451.9. But what is important is *why* the Court of Appeal reached this view, the reasoning for which is set out/indicated in {1} and {3} and is as follows. The nature of the Aii cover (unlike the Ai cover) is that the terrorism is not an insured peril alone and without more"*[s]omething extra is required*" . There, however, is cover for terrorism "*provided*" it generates warnings, but given that the composite peril in Aii is "*premised on*" the underlying terrorism, it cannot be intended that insured event in the exclusion is confined to the insured event under the particular cover, as it cannot be intended "*to exclude loss directly caused by a warning concerning terrorist activities just because it could also be said that the loss was also directly and concurrently"* .

451.10. This is not a principle of law; it is an illustration of the intention one would ordinarily construe when there is a public authority clause with an underlying cause—that the public authority action is to be regarded as the 'something extra' that gives rise to a trigger but is not to be treated as a separate cause for causal purposes from its underlying cause. These insurers can give no explanation for sentences {1} and {3}.

451.11. This is also premised on the Court of Appeal understanding that some of the losses were directly but concurrently caused by the terrorism—otherwise the exclusion could not apply because all the losses would be directly and only caused by the insured event of the warnings themselves—yet this did not prevent such losses being recoverable.

451.12. This also, it is submitted, provides an indication as to why Tomlinson J was willing to find that the terrorism and warnings were inextricably linked, which is not (as the Court in this case correctly indicated) merely a factual matter.

451.13. Finally, whilst there was no specific discussion of the 'but for' test either at first instance or on appeal, it was effectively undisputed and indisputable that but for the warnings some (and possibly the majority) of the loss would have been suffered anyway given that the events of 9/11 had an impact on travellers' willingness to travel on cruises, i.e. the terrorist attacks on their own would have had a substantial adverse effect on Silversea's business.[485] Nevertheless, that did not provide a bar to cover in respect of those losses that would have occurred irrespective of the warnings. It is plainly

[485] 1st instance para 9 {E/18/402}.

unrealistic to suggest that the result of *The Silver Cloud* would have been any different if there had been a trends clause with an express 'but for' test.

452. The *Silver Cloud* case shows the courts approaching a public authority clause and engaging with the composite nature of an underlying event able to and contemplated to have effects inextricable from those of the public authority acting concurrently. Leaving catastrophes on the scale of COVID-19 and 9/11 for a moment, Hiscox1-4 includes a similar 'bomb threat' clause, triggered by inability to access premises due to police or army restrictions caused by the presence or suspected presence of a bomb at the premises or in its vicinity. Imagine a street or shopping centre is closed down due to a bomb at the insured's shop or nearby. Hiscox would say:

452.1. The insurance does not cover all BI losses due to the bomb threat where the army shut down the street/shopping centre/shop because it is not insurance against the "*effects of a bomb threat*".[486]

452.2. The insured must prove what customers did not attend its shop but would have done had there been a bomb threat but the army not acted. (As set out above, it is not clear whether Hiscox would say that the insured must prove what customers would have attended had the army not closed the *shop* but left the rest of the shopping centre/street open, or instead what customers would have attended had the army not closed the entire shopping centre/street.)

452.3. If the insured would have closed the shop as a precaution even if not required to close then there can be no recovery because "*he has not bought insurance against this eventuality*".[487]

452.4. It is impermissible to ask what profits would have been made had the bomb threat not taken place because the bomb threat is not the insured peril and the insured has not protected itself against the consequences of that individually[488] and there are other critical elements between the bomb threat and the loss.[489]

452.5. The insured is entitled, however, to posit in the counterfactual that the bomb threat did not take place 'insofar as' the bomb threat caused the army action,[490] at least if they can work out what that means (which the FCA cannot).

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[486] Hiscox Appeal Cause para 68 as adjusted to this example {B/6/173}.
[487] Hiscox Appeal Case para 67 {B/6/173}.
[488] Hiscox Appeal Case paras 31 {B/6/164} and 50. Or maybe Hiscox says that the insured peril is in this case simply the bomb threat; after all, the clause is called 'bomb threat'—compare Hiscox Appeal Case para 34.1 {B/6/165}.
[489] Hiscox Appeal Case para 31 {B/6/164}.
[490] Hiscox Appeal Case paras 39 {B/6/167} and 42, also 21.1.

452.6. The bomb threat and army action are not inextricably linked so as to be impossible to separate, and it is not artificial or unrealistic to suppose that there would have been that part of a bomb threat that was not 'insofar as' to cause the army action but no army action (or no army action for this shop): "*[c]ounterfactuals are in any context artificial and unrealistic*" and this is "*simply dictated by the content of the agreed insured peril*".[491]

453. It is hoped that the Supreme Court agrees that this is absurd. No insurer or loss adjuster would approach the bomb threat clause in this way. It is only the size of the COVID-19 pandemic and the insurance claims it gives rise to that have induced Hiscox to strain to make these absurd suggestions as to the extent of the cover agreed between the parties, which, it must be remembered, has implications for all public authority clauses including those for bombs, vermin, sanitation etc.

454. **Fourth**, the inextricability is not disputed by any analysis[492] (although Hiscox does assert that "*the supposed indivisibility is fallacious*"[493] and that the Court's approach was to "*abdicate any attempt to inquire into the cause of the loss*"[494]). The insurers seek to make a virtue of the overlap, by emphasising that some of the losses would have occurred anyway even without the Government action.[495] As in *The Silver Cloud*, that is doubtless true, but does not make the causes any more extricable. Are the insurers really expecting a small business insured (or its own loss adjuster, for that matter) to bring forward a 2,000 page expert report that seeks to perform an event study of the pandemic by comparing with Swedish businesses, or businesses not ordered to close, or the same business at different times, while building in all the differences between the particular business and the comparators? How would this build in the unprecedented world the insurers contend for where the insured is the only cinema left open, or all pubs are allowed to stay open while the rest of the lockdown remains in force, and where some but not all of the outbreak did not take place at all?

455. **Fifth**, this counterfactual is, as the Court repeatedly said "*unrealistic and artificial*". This does not, as insurers suggest when attacking a straw man of their own construction[496], relate to the banal sense in which the counterfactual is unrealistic and artificial because it did not happen and has to be constructed (i.e. because the counterfactual is counterfactual). It refers instead to the fact that it creates a counterfactual that could never happen. In cover against hurricane damage, it

[491] Hiscox Appeal Case paras 61-2 {B/6/171}.
[492] See for example Hiscox's analysis at Hiscox Appeal Case para 75 {B/6/175}, which again avoids engaging with exactly what world is being modelled, without which part of the pandemic and the restrictions, and how this would be conducted.
[493] Hiscox Appeal Case para 17 {B/6/161}.
[494] Hiscox Appeal Case para 76 {B/6/176}.
[495] Arch Appeal Case para 41 {B/4/111}, Hiscox Appeal Case para 64 {B/6/172}.
[496] Hiscox Appeal Case para 61 {B/6/171}.

would require very clear words to provide an indemnity to put the insured in a position that could never have occurred where the hurricane still exists save in an island of immunity where the insured hotel sits. In cover against notifiable disease or emergency, it would require very clear words to provide an indemnity to put the insured in position that could never have occurred where the disease or emergency and national coordinated response still exists save in an island of immunity from the national coordinated response and/or the disease for emergency to some (undefined) limited extent for the insured business (and, possibly, businesses like it—the insurers' proposed counterfactuals are unclear and inconsistent as set out above).

456. It would be possible to provide for such a counterfactual—the scope of the indemnity is a creature of the parties' agreement and nothing else—but it would be absurdly uncommercial, as well as being contrary to the way the law of obligations typically operates. The law typically prefers realistic counterfactuals to artificially constructed ones crafted to attempt to strip out some minimum concept of wrongdoing or unrealistic view of what that wrongdoing is. See further paragraph 15 above.

457. It is correct that, as Arch ingeniously observes, if a claim is made during this pandemic for closure due to fire damage, the counterfactual would have to include the unrelated pandemic (which is no part of the insured peril for that cover) and model the business's performance.[497] However, the possibility of such an unusual case arising out of concurrence of an extrinsic disaster that is by definition not contemplated in the insured peril itself (fire), does not make it anything but commercially absurd to require such an exercise *in every case or most cases* (because the issue arises by reference to part of the very insured peril specified).

458. At trial, the FCA contended that, at least where there is closure, the evidential burden of proof would shift to the insurers to show that the prima facie case that the closure caused loss was rebutted by alternative causes (other COVID-19 effects) advanced by the insurers, i.e. that the loss would have happened anyway, relying on *BHP Billiton Petroleum Ltd v Dalmine SpA* [2003] EWCA Civ 170, and concluding: "*[i]n other words, it is the Defendants who have to prove how members of the public would act if not ordered to do something, how the Government would act if the disease was not present in a particular place, etc.*"[498] This was thought to be of some importance to insureds if the FCA lost on the general causation issues (which it did not). The insurers disputed this as "*heterodox*" and wrong.[499]

[497] Arch Appeal Case para 40 {B/4/110-111}.
[498] FCA Trial Skeleton paras 249-260 {G/5/21-24}.
[499] MS Amlin Trial Skeleton para 254.10 {G/13/137}, insurers' Joint Causation Trial Skeleton para 26.5 {G/11/114-116}.

459. The insurers reversed their position at trial, accepting that in these circumstances the evidential burden may shift to the insurers,[500] realising that the Court was concerned with the impossible task with which the insureds were faced on the insurers' approach. However:

459.1. This does not save the insurers. The inextricable and inseparable remain inextricable and inseparable. The modelling task remains impossible. The fact that in some cases the evidential burden may shift to insurers does not alter the absurdity of tasking either party with this modelling task, nor does it remove the need for the insured to be able to challenge the insurer's approach.

459.2. The insurers' concession does not run very deep, given its approach is that the evidential burden can be shifted easily by generally pointing to there being effects of diseases without lockdowns, supporting the insurers' default pre-trial position that none of the losses were shown to have been caused by the Government actions. Thus the insurers' trial causation skeleton stated:[501]

> "In any event, even if there was a burden on the insurer to show that loss was caused by matters other than the insured peril, this would not be difficult to discharge in practice. Assuming that the insured peril is (broadly) restrictions imposed, the experience of Sweden teaches that some/most/all of the loss would be incurred in any event, even in the absence of government restrictions (see paragraph 25.15 above). The fact is that Swedish businesses have incurred losses on a comparable scale to those seen in the UK, despite the absence of restrictions like those seen in the UK."

459.3. And elsewhere, the position of insurers (speaking through Mr Kealey QC) was that (i) the nature of COVID-19 and the UK Government response to it is such that it is or might be impossible to extricate individual parts of it, and (ii) if a policyholder cannot extricate it into parts, then it will fail to satisfy its burden of proof and has no cover.[502]

Hiscox Ground 4 'solely and directly'

460. Hiscox's wording (along with MSAmlin 2) only covers losses resulting "*solely and directly*" from the interruption (caused by any of the perils specified).

461. As best as it can be understood (and Hiscox spends only half a page of its Appeal Case on this, Ground 4[503]) Hiscox's case on appeal is that the inclusion of the words 'solely and directly' support its causal combination theory that one only removes each element from the counterfactual insofar as it caused the next element. It complains that it made submissions to

[500] Day3/87-88 {G/135/2382}, Hiscox Appeal Case para 75.6 {B/6/175-176}.
[501] Insurers Joint Causation Trial Skeleton para 26.5(c) {G/11/116}.
[502] Day4/87-92 {G/25/190-191}.
[503] Hiscox Appeal Case paras 97-100 {B/6/181} and Hiscox Ground 4 {A/6/135}.

this effect (although gives no reference) but that although the Judgment records this (Judgment para 265) there is no decision on their meaning and effect (a point not drawn by Hiscox to the Court's attention at the time of the submission of corrections and omissions in the draft judgment). Hiscox does not advance any other reason why 'solely and directly' should invalidate anything the Court said on causation.

462. This is therefore a narrow point. The answer to it is twofold.

463. First, each causal connector link—deliberately different at each element of the chain—relates only to the element before it (a point made at trial, noted at Judgment [259] and [262] and presumably correctly accepted by the Court). This can be illustrated by the decision in *224981 Ontario Inc v Intact Insurance Company* 2016 ONSC 642 at paras 32-4. There, the Ontario Superior Court of Justice considered a landlord's BI claim where the cover responded if the loss of rent 'resulted from' an interruption to the business activities which was 'caused solely by direct physical loss… or damage' (caused by fire). (So, there the solely and directly wording was not between loss and interruption, as in Hiscox's wordings, but between interruption and damage.) MD Faeta J observed at paragraph 32:

> "Zurich submits that the loss of rent claimed by the Owner must have been solely caused by the fire. I disagree. The policy states that the interruption, not the loss, must be "caused solely by direct physical loss of or damage to covered property…caused by a covered cause of loss". As noted above, I have found that the interruption was caused solely by the destruction of the building which was caused by the fire."

464. Thus it is necessary to apply the appropriate causal connector wording only to the two elements it connects, and thus all the wording emphasises is that the interruption must have been the sole and direct (so, sole proximate) cause of the loss.[504] The cause of the interruption and the cause of the restrictions are subject to different ('caused by' and 'following' respectively) language.

465. Second, construction is a holistic question, and the Court reached the right result as to the insured peril and what needs to be stripped out of the counterfactual for the various reasons set out above and below, including the nature of the contemplated relationship between a notifiable disease and the public authority restrictions it will cause. The words solely and directly are immaterial to that construction question as compared with those factors.

[504] I.e. this wording excludes the *Miss Jay Jay* principle by which providing the insured peril is one of a number of proximate causes (and none of the others are excluded) there is cover. By the 'solely and directly' wording the interruption must be the only proximate cause. Hiscox appears to agree: Hiscox Defence para 99.2 {G/18/157}.

Proximate cause and safety valves

466. It is important, when considering whether the cover will respond and what losses will fall within the indemnity, to consider all elements of the cover. This includes (i) when the clause will be triggered (which requires all the elements of the composite trigger including causal connectors to be satisfied), (ii) whether the composite peril proximately caused the loss, and (iii) the correct application of the but for test within the trends clause and of the trend or circumstance adjustment provisions. Many of the insurers supposed *reductiones ad absurdum* simply misapply the policy by focusing on only one element.

467. As set out above (e.g. paragraph 421) the FCA and High Court's construction does not render the insurance a cover for all the consequences of a notifiable disease outbreak or emergency. There has to be in the case of Hiscox1-4 an interruption caused by an inability to use the premises, or in other cases a prevention of access or suchlike, which causes loss. Without that (and this case has shown vividly that these terms do a lot of work in determining which situations do and which do not qualify) there is no cover. And prior to that inability to use/prevention etc, there is no cover. The composite peril (including inability to use/prevention etc) also has to have proximately caused the interruption/interference/loss: see further FCA's Appeal Case paragraphs 53 to 57 as to the work this concept can do. There is no free-standing cover for emergency or disease, it is simply that once the policy is triggered the emergency or disease and its effects must be excluded from the counterfactual for the purposes of adjusting the standard revenue under a trends clause or otherwise quantifying the loss, on the basis that they are elements of a composite peril (and an indivisible one at that). Following, for example, a closure of the business premises, one does not therefore adjust the loss of turnover calculation applied by the policy formula by reference to the effect that the pandemic would have had on the business had it not been forced to close.

F. HISCOX SCOPE AND COVER ISSUES: HISCOX GROUNDS 6 TO 8

Hiscox Ground 6: The meaning of 'occurrence' in Hiscox1-3

468. Hiscox Ground 6 concerns the meaning of the words "*following an occurrence of a notifiable human disease*" in Hiscox1-3, policies which are unique amongst the policies before the Court specifically covering disease in not providing any distance criterion for the disease's presence (although there is also no distance criterion for the 'emergency' in the Arch policy).

469. Unsurprisingly, the Court below held at Judgment [271] that these clauses have no vicinity limit, and the words "*an occurrence*" were apt to refer to 'an outbreak', so that the COVID-19 outbreak in the UK qualifies as "*an occurrence of a notifiable human disease*" from 5 March in England and 6 March in Wales when COVID-19 became notifiable.

470. The Court also held at Judgment [271] that the causal link in these clauses, which requires restrictions to be imposed "*following*" that occurrence, was also satisfied. This was because the causal link requires a loose causal connection (and not proximate causation, which was common ground). All the restrictions on which the FCA relies did indeed "*follow*" the COVID-19 outbreak because they took place after it and were causally connected to it.

471. Hiscox appeals the Court below's findings that the words "*following an occurrence of a notifiable human disease*" in Hiscox1-3[505] covered the COVID-19 outbreak in the UK. Hiscox argues that the Court below should have found that this phrase "*means something limited, small-scale, local and specific to the insured, its premises or business*",[506] and therefore that the national COVID-19 outbreak did not apply. Hiscox is not appealing (i) the Court's decision that the word "*an occurrence*" can refer to an outbreak, or (ii) the Court's decision (which was common ground) that the word "*following*" involved a causal connection looser than a proximate cause test.[507]

472. The FCA's case, accepted by the Court below, is that this policy quite clearly lacks a vicinity requirement, and there was therefore an 'occurrence' of COVID-19 within the policy with the emergence of further cases of COVID-19 across the country after it had become a notifiable disease on 5/6 March. There was an outbreak of COVID-19, and so it had 'occurred'. There being no vicinity requirement, there is no need to show contraction of COVID-19 within any particular locale of the premises.

473. It will not be lost on the Court that these are the only policies which require the occurrence of a disease but which do not even contain a radius requirement. Hiscox4 has a 1-mile requirement, but Hiscox1-3 have none at all. It is quite difficult to see how the policy could have expressed the absence of vicinity requirement any more neutrally: the word "occurrence" simply denotes that something has occurred. By contrast with this clause, the other sub-clauses within the same hybrid clause in Hiscox1-3 require "*vermin or pests at the insured premises*" or an illness traceable to

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[505] In Hiscox1 {C/6/401} and Hiscox3 {C/8/462} the words used are "*following an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority*", whereas in Hiscox2 {C/7/431} the words used are "*following an occurrence of a* ***notifiable human disease***", the definition of which is "*[a]ny human infectious or human contagious disease, an outbreak of which must be notified to the local authority*", but no party suggests anything turns on this.
[506] Hiscox's Appeal Case para 131 {B/6/189-190}.
[507] Hiscox's Appeal Case at fn 23 {B/6/164}.

"*food or drink consumed on the premises*".[508] Further, each of Hiscox1-3 have vicinity requirements in other clauses: for instance, expressly requiring there to be "*insured damage in the vicinity of the insured premises*", or mandating an incident be "*within a one mile radius of the insured premises*".[509] The express use of these geographical requirements establishes a clear intention not to apply such a requirement in the hybrid clause. If the parties had intended one, they would have included one – as, indeed, they did in Hiscox4.

474. Hiscox's case is, absurdly, that the use of the term 'occurrence' in Hiscox1-3 would make them as narrow as, or narrower than, Hiscox4, and render the 1-mile restriction in Hiscox 4 entirely redundant because that clause also has the term 'occurrence' in it (indeed is identical to Hiscox1-3 save for the addition of the 1-mile restriction).

475. This is supported by the nature of the peril. As discussed above, these are notifiable disease clauses which necessarily can be triggered by pandemic or other wide-area disease, because its cover is for infectious diseases that are sufficiently dangerous to the public at large be notifiable. Had the parties intended to exclude loss resulting from contagious diseases when those diseases became pandemics, then the reasonable person would anticipate that it would have been excluded by clear words. In fact, Hiscox did exclude action in response to pandemics in the cancellation and abandonment coverage in Hiscox1 (and Hiscox4). That clause provides cover for cancelled events, but excludes "*any action taken by any national or international body or agency directly or indirectly to control, prevent or suppress any infectious disease*".[510] The relevance of this pandemic exclusion is obvious: it demonstrates that the draftsman of Hiscox1 had pandemics in mind when drafting the policy, and had in mind how to exclude their effect, but decided not to do so within the hybrid disease/public authority clause. The absence of the exclusion is relevant because the clause could otherwise be regarded as covering that situation.

476. Nonetheless, Hiscox gamely argues that the word "*occurrence*" within Hiscox1-3 imports several implied limitations on cover. It has expressed these limitations in different ways: "*a small-scale event which must be local and/or specific to the insured, its business, activities or premises*",[511] "*one which is local and specific to one or more of the insured, its business or its premises*",[512] "*something limited, small-scale,*

[508] {C/6/401}.
[509] {C/6/400}.
[510] Hiscox1 {C/6/402}, Hiscox4 {C/9/500}.
[511] Hiscox Defence 75.5 {G/18/155}, and similarly 14.3 {G/18/153}.
[512] Hiscox's Trial Skeleton para 154.4 {G/8/54}.

local and specific to the insured, its premises or business",[513] or "*an occurrence of a notifiable disease that was small-scale, local and in some sense specific to the insured*".[514]

477. These varying formulations are said by Hiscox to be a "*geographical limit*",[515] but they in fact comprise four quite different things: (1) an event; (2) which is local; (3) which is small; and (4) which is 'specific to' the insured. There is no basis to read in any of them here, and they completely disregard that this is a notifiable disease clause contemplating outbreaks of a contagious disease. They are addressed in turn.

Occurrence as 'an event'

478. Hiscox argues that the word "*occurrence*" requires the covered peril to be "*comparable to an incident or event*".[516] The word 'occurrence' simply means a 'happening'[517] and does not (unsurprisingly) have a single narrow meaning in insurance law or otherwise.[518] It must be construed and applied in the context that the thing that the clause contemplates must happen is a notifiable infectious or contagious disease, including something like COVID-19 (or SARS).[519] A disease happens when an outbreak of the disease occurs. In the context of the clause, and as the Court rightly held at Judgment [271], if there was an outbreak of a disease one would describe it as an occurrence, not separate and multiple occurrences by reference to each individual who has contracted the disease. The occurrence of the disease is the totality of the cases of the disease in the outbreak. It cannot therefore be sensibly denied that an outbreak of a disease (the normal way a notifiable disease would happen) is an occurrence—indeed, the clause requires the disease to be one of the diseases in respect of which "*an outbreak must be notified to the local authority*" and the *Shorter Oxford Dictionary of English* defines "*outbreak*" as "a *sudden occurrence; an eruption; an outburst (of emotion, action, energy, disease)".*[520] Insofar as there is a need to identify some kind of event (a word which this clause does not use), as set out in paragraph 236 above and in the FCA's Appeal Case as to the meaning of that word in QBE2-3, it is perfectly sensible to describe the disease outbreak as the event and some other wordings expressly do just that.

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[513] Hiscox's Page 5 Information, para 56 {A/6/137}.
[514] Hiscox's Appeal Case para 8.1 {B/6/158}.
[515] Hiscox's Appeal Case para 119 {B/6/187}.
[516] Hiscox's Appeal Case para 113 {B/6/185}.
[517] Thus in *Schiffshypothekenbank Zu Luebeck A.G. v Norman Philip Compton, 'The Alexion Hope'* [1988] 1 Lloyd's Rep. 311, the Court of Appeal (at p. 315, also p. 316) {G/78/1563} agreed with a submission made that "*occurrence*" "*should be given its ordinary meaning, as an event or happening*". *The Shorter Oxford Dictionary of English* (6 edn, 2007) {G/127/2371} defines "*occurrence*" as: "*a thing that occurs, happens, or is met with; an event, an incident" or "the action or an instance of occurring, being met with, or happening. Also the rate of measure of occurring, incidence."* The definition is broad-ranging but centres on a "*happening*".
[518] See further the Hiscox Action Group's Respondent's Case para 39 as to authorities that 'occurrence' does not mean a particular type of happening.
[519] Some clauses require illness resulting from the disease but this wording merely requires an occurrence of the disease.
[520] {G/128/2372}.

Local

479. The second implied limitation is that what happens must be 'local'. Hiscox contends that its cover is "*objectively intended to address risks local… to the insured*"[521] and raises a *noscitur a sociis* argument based on each of the sub-clauses within the hybrid clause, which it says "*insures what can only be local events*".[522] But this is wrong because sub-clause (a) within the hybrid clause provides cover for inability to use the insured premises due to restrictions imposed "following a murder or suicide", with no vicinity restriction. Contrary to Hiscox's arguments,[523] a murder in Birmingham might lead the police to close off the area around the killer's house in Reading, his place of work in Bromley, his accomplices' garages in Harlow, and a self-storage unit containing evidence in Devon – all of those locations would have cover, even though the murder was nowhere near any of them, because they all suffered an inability to use due to restrictions imposed by a public authority following a murder. Equally, a students' suicide whilst on holiday in Cornwall might lead to the closure of the student's place of work in their home town in Edinburgh and their university accommodation in Durham: that interruption would also be covered. Those may not be central cases, but the key is that (i) they could take place at some distance from the premises, (ii) Hiscox has chosen not to specify that they need to be at the premises, (iii) if they did take place elsewhere Hiscox would be wrong to refuse cover on the basis of an implied locality requirement.

480. There is also no warrant for a 'local' limitation because 8 of the 18 other perils in the BI section are not local at all. These provide cover for interruption caused by insured damage at any fundraising event which can take place anywhere (clause 5); insured damage at the premises of direct customers and unspecified suppliers who can be based anywhere in the EU (clauses 6 and 8); insured damage at the premises of specified customers and specified suppliers who can be based anywhere (clauses 7 and 9); utilities or service failures caused by insured damage to any provider based anywhere in the EU (clauses 10 and 11); and failure of any online marketplace anywhere in the EU (clause 12). Hiscox argues that these covers are "*specific to the insured in the sense that there is a specific pre-existing relationship*"[524] but that does not make them (i) local to the insured, or (ii) specific to the insured, the failures of utilities and service providers and of online marketplaces having the potential to impact millions of people.

[521] Hiscox's Appeal Case para 133 {B/6/190} – although elsewhere this becomes a "*local nexus*", which is nearer element four (specificity): see para 134.
[522] Hiscox's Appeal Case para 134 {B/6/190}, cross-referring to para 112, but see also paras 108-112.
[523] Hiscox's Appeal Case para 109 {B/6/183}.
[524] Hiscox's Appeal Case para 141 {B/6/191-192}.

481. More generally, the *noscitur a sociis* principle is being asked to do too much, especially in circumstances in which where a locality requirement is intended it is specified (both in the same clause and in other clauses in the policy): see paragraph 473 above.

Small and specific to the insured

482. The third and fourth limitations are that the 'event' must be both 'small' and 'specific' to the insured. By this, Hiscox seems to mean that the cover should exclude, or at least not respond to, wide area events: it argues that the aim of its policy is to cover "*misfortunes that happen specifically to the insured, it may be alone, it may be in common with some others, but not misfortunes whose character is that they affect everyone in the nation*".[525] It bases this argument both on the fact that the BI insurance is an adjunct to property cover, and on the 18 other covers in the BI section, which it says demonstrate "*that there is, objectively, no intention to insure the effects of widespread pervasive events*".[526]

483. The argument is also wrong, because both the damage and BI sections do insure the effects of widespread and pervasive events. The damage section responds to damage caused by riots, civil commotion and storms.[527] Clause 12 of the BI section provides cover if any online marketplace in the EU fails because of certain types of damage.[528] The failure of an online marketplace will affect all its sellers and all its buyers (both actual and potential) indiscriminately, likely affecting thousands of people, if not many more. The clause being an adjunct to property cover is nothing to the point. The non-damage extensions are necessarily not dependent upon property cover in general terms, and can range far and wide in what they cover, although it is true that this particular clause is tied to the property: just as property damage covers require damage to the property (however wide the underlying fire, storm, earthquake or other peril), this non-damage cover requires an inability to use the premises (however wide the disease outbreak and the public authority restrictions it leads to).

484. Hiscox's reliance on the virus exclusion in this regard is difficult to understand.[529] That clause excludes cover for any interruption caused by "*any virus which indiscriminately replicates itself and is automatically disseminated on a global or national scale or to an identifiable class or sector of users unless created*

[525] Hiscox's Appeal Case para 133 {B/6/190}.
[526] Hiscox's Appeal Case para 137 {B/6/191}.
[527] See the general cover clause at Hiscox2 {C/7/421} and Hiscox3 {C/8/450} providing all risks damage cover. There is no cover for damage caused by "*storm or flood to gates or fences*". Hiscox2 {C/7/422} and Hiscox3 {C/8/451}, which proves there is cover for damage caused to other insured property *e.g.* buildings and other items; and the policyholder is obliged to report to the police any damage arising from "*riot or civil commotion*" {C/7/428}, which proves there is cover for that too.
[528] Hiscox2 {C/7/431}, Hiscox 3 {C/8/461}.
[529] Hiscox's Appeal Case para 144 {B/6/192}.

by a hacker",[530] a hacker being defined as "*[a]nyone who maliciously targets you and gains unauthorised access to your website [etc]*".[531] Far from showing that the hybrid clause must similarly intend to exclude indiscriminate action, the fact is that these words of exclusion were used there but not in the public authority clause; that shows that there is no requirement that the disease occurs at the premises or in their vicinity.

485. And, Hiscox's position is inconsistent with its own concession that the 'public authority' in this clause includes the Government, which follows from its acceptance that Regulation 2 of the 21 March Regulations and Regulations 4 and 5 of the 26 March Regulations were 'restrictions imposed'.[532] It is very difficult to see why or when the Government would place restrictions on a premises following a small-scale, local event which is specific to the insured. This also points to one of the many ways Hiscox could have been expected to draft in a locality limitation if it had wanted one—by requiring that the action be by a local authority (words used in 13b itself when referring to who the disease outbreak must be notified to make it a qualifying disease, but not in the stem when referring to the type of authority imposing the restrictions), and by making it clear, as it did in the 'Cancellation and abandonment' clause, that action by a national body was not covered.

486. And again, more generally, this is a clause that provides cover not just for diseases, not just for contagious diseases, but only for the 31 (plus any added) list of diseases that have to be notified to the authorities. These can arise on a small scale but the nature of the peril is such that they have the potential not to be so confined and that pandemics or epidemics are in the range of contemplated scenarios from the nature of notifiable diseases (as the Court found, see above paragraphs 134ff). The natural scope of the peril extends beyond the 'small-scale', hence the need for an exclusion if the contrary is intended.

487. Thus, the Court below was right to find that the outbreak of COVID-19 was an occurrence of a notifiable disease.

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[530] {C/6/403}.
[531] {C/6/381}.
[532] See Hiscox's Trial Skeleton at para 201 {G/8/58}.

Hiscox Ground 7: The meaning of 'interruption'

488. Hiscox Ground 7 concerns the meaning of "*interruption*" in the 'stem' language of the Hiscox1-4 clauses.[533] The Court below held that, correctly construed in its contractual setting, "*interruption*" includes interference or disruption, and not just a complete cessation of the insured's "*activities*" or "*business*". Whether there has been such an "*interruption*" is a matter of fact in each case.[534]

489. Contrary to these conclusions, Hiscox contends that "*interruption*" should be interpreted as requiring a complete cessation of business activities at the insured premises and nothing less (its primary contention), or (its alternative case) at most something very close to complete cessation involving no more than an insignificant or nugatory continuation of activities. There is no practical difference between these two positions: both require an extreme and highly restrictive interpretation of "*interruption*" which is unjustified as a matter of the ordinary meaning of the word and is irreconcilable with the BI cover which the policies are obviously intended to provide.

490. Examples of this irreconcilability (to which Hiscox provides no good answer in its Appeal Case) were given by the Court in relation to the cover for Loss of Attraction, Unspecified customers and Specified customers, and Unspecified suppliers and Specified Suppliers. These are referred to below, but it is worth noting at the outset the basic irreconcilability of Hiscox's definition of "*interruption*" with the nature of the indemnity which the policies are designed to provide in respect of BI losses.

491. Thus:

491.1. The indemnity is calculated by reference to the difference between the insured's "*actual income*" during the period of indemnity and its estimated income had there been no "*interruption*" to "*your activities*"/"*your business*";[535]

491.2. The indemnity includes 'increased costs of working',[536] covering costs incurred by the insured in minimising the reduction in income from its activities[537] during the indemnity

[533] Judgment [246-253]. In Hiscox1 the stem is: "***We** will insure **you** for **your** financial losses and other items specified in the schedule, resulting solely and directly from an interruption to **your activities** caused by:*" {C/6/400}. In Hiscox2-4, the phrase used is "**your business**" rather than "**your activities**" (e.g. Hiscox2{C/7/431}).
[534] Declaration Order para 17.2 {C/1/12}; Judgment [274, 409, 414].
[535] See e.g. Hiscox1 at Judgment [246] and in the policy at {C/6/403}.
[536] {C/6/399}.
[537] Hiscox1: "*from your activities*" {C/6/399}; Hiscox2-4: "*to your business*" (e.g. Hiscox2{C/7/430}).

period; and 'additional increased costs of working'[538] covering costs incurred with Hiscox's consent "*in order to continue* ***your activities*** *or minimise* ***your*** *loss of* ***income*** *or loss of* ***gross profit*** *during the indemnity period*";

491.3. The indemnity also includes 'alternative hire costs',[539] being the additional costs and expenses incurred in hiring a substitute item while insured property is being repaired or until it is replaced; and

491.4. The items of uninsured working expenses to be taken into account when calculating Gross Profit include rent "*for the* ***insured premises*** *that you must legally pay while the* ***insured premises*** *or any part of it is unusable as a result of* ***insured damage, insured failure*** *or restriction*" (underlining added).[540]

492. All these provisions clearly contemplate the possibility of business activities continuing during the period of indemnity following an "*interruption*". That is, they contemplate an "*interruption*" which does not bring all business activities at the insured premises to a complete or near complete standstill, but which nevertheless has sufficient operational impact on the business's activities to cause financial loss and/or to require the insured to incur costs to enable it to keep trading and so minimise loss. There is nothing unusual or strained about "*interruption*" bearing such a meaning. 'Interruption' is a flexible concept and the word is perfectly capable of referring to the kind of disruption to or interference with business activities which these provisions are designed to accommodate and respond to.

493. Contrary to paragraph 168 of Hiscox's Appeal Case, the fact that some other insurers' wordings employ 'interruption or interference' rather than 'interruption' alone can be of no real assistance to Hiscox. The approach of the Court below to this point was entirely correct: the overriding imperative is to construe the word "*interruption*" in its own contractual setting.

494. The FCA has always accepted that "*interruption*", as used in the policies, conveys some element of cessation, but that does not mean that the word is restricted only to situations in which an insured is unable to continue its operations at the insured premises to any meaningful extent. It is a perfectly natural use of the word to employ it to refer to an element of cessation in a business's normal operations. In the *Silver Cloud* case [2004] EWCA Civ 769, [2005] Lloyd's Rep 696 (discussed in Section F above) at [113][541] Rix LJ referred to 'interruption' and 'interference'

[538] {C/6/399}.
[539] {C/6/399}.
[540] In Hiscox1, 'Gross profit' is defined at {C/6/381}, and 'Uninsured working expenses' and 'rent' at {C/6/382}.
[541] {E/19/444}

as each requiring some "*operational impact*" on the business.[542] That is also an apposite usage in the present case, capturing the broad variety of means by which the triggers specified in the BI cover clauses in Hiscox1-4 may impact on the operations of the insured at its business premises to cause an "*interruption*".

495. Thus, looking at the 'hybrid' clause, interruption (in the relevant sense) to business activities may, for example, take the form of a closure of premises in whole or part, a loss or reduction of customers, a loss or reduction in supplies, a restriction on the modes of business than can be carried on, a loss or reduction in the insured business's capacity to generate turnover, or simply an increase in the cost of working (where the costs are incurred to avoid a cessation that would otherwise have occurred). In such each case, it is a question of fact whether "*interruption*" has occurred, which will involve considering the substance of the business before and after the relevant 'inability to use' the insured premises. Where the insured has suffered (or in the last case avoided) an element of cessation in its normal operations causing loss, the policy should respond. Given that the requirement in the Hiscox 'hybrid' clause is 'inability to use', there is likely to be an interruption whenever that trigger is satisfied.

496. Whilst it is telling that Hiscox feels the need to attempt to provide some reassurance, contrary to paragraph 170 of its Appeal Case it is no answer to the findings of the Court below, or the points made above, that Hiscox's construction is not "*unduly onerous*" because the complete cessation of activity at the insured premises which it requires could be short, and if the insured has more than one set of premises a complete cessation of the entire business may be avoided. Neither observation engages with the fundamental points: (1) that an activity may be interrupted without being brought to a complete standstill, and (2) that it is commonplace for a business to engage in a number of activities in parallel, some part of which may be interrupted without bringing all operations to a standstill.

497. In reaching its decision on the meaning of "*interruption*", the Court below focused in particular on a number of the Hiscox BI cover clauses (Loss of Attraction, Unspecified customers and Specified customers, and Unspecified suppliers and Specified Suppliers) which, as it correctly found, only make sense, or can only be given meaningful commercial effect to, if "*interruption*" is interpreted to mean 'business interruption' generally, and encompasses disruption and

[542] The policy in that case included two insuring provisions, one of which required interference "*with the scheduled itinerary*" of a cruise ship and the other for a cruise to be "*interrupted*" with a resulting loss of time (see paragraphs 110-111 {E/19/443-444} of the judgment). The clause, like the BI clauses in issue in this Claim, was concerned with the operational impact of the damage on the business, although the provisions in that case were narrower than those under consideration here (see paragraph 107 {E/19/443} of the appeal judgment and paragraph 37 {E/18/411} of the first instance judgment) as they specify what part of the business's operations must be interfered with/interrupted.

interference.[543] Paragraphs [172]-[176] of Hiscox's Appeal Case provide no good answer to the Court's findings in this regard:

497.1. The Loss of Attraction clause[544] provides cover where insured damage in the vicinity of the insured premises, or of any fundraising event, results in a shortfall in expected income or gross profit. The Court was right to find (in Judgment [410]) that, since the clause contemplates a shortfall in expected income, it clearly encompasses not only the case where all activity ceases at the insured premises but also the case where activity is reduced (falling short of total cessation). The Court was also right to reject the argument, which Hiscox seeks to revive on this appeal, that the provision is incorrectly placed in the policy and should appear as one of the so-called 'Additional Covers'.[545] As the Court said, that would require rewriting the wording and there is no good basis for doing so: the provision is plainly included as one of the covers contingent on "*interruption*" in the stem wording, and proper effect can be given to it on that basis provided that the extreme interpretation of "*interruption*" advocated by Hiscox is not adopted.

497.2. The Unspecified customers and Specified customers clauses[546] provide cover where insured damage at the premises of customers of the insured causes an interruption in the insured's activities. The Court was right to find (in Judgment [412-413]): (1) that the only way these provisions would apply if Hiscox was right about the meaning of "*interruption*" would be if there was a single critical customer upon whom the business was totally dependent for custom, and (2) that it is inherently unlikely that that the intention was to limit the cover to a single customer in this way. The extreme examples relied on by Hiscox in paragraph 175 of its Appeal Case (seeking to demonstrate that the clause would still have some utility on its construction) merely emphasise that the cover would in fact be largely illusory if "*interruption*" carried the restricted meaning it contends for.

497.3. The Unspecified suppliers and Specified Suppliers clauses[547] provide cover where insured damage at the premises of suppliers of the insured causes an interruption in the insured's activities. The Court made essentially the same findings in relation to these

[543] Judgment [274, 409-113].
[544] In Hiscox 1 at {C/6/400} and Hiscox 4 at {C/9/499}.
[545] Hiscox's Appeal Case para 173 {B/6/200}.
[546] In Hiscox 1 at {C/6/400}.
[547] Hiscox1 at {C/6/400}. Corresponding provisions in respect of "Suppliers" appear in Hiscox2-4 at {C/7/431}, {C/8/461} and {C/9/498}.

suppliers clauses as it did in relation to the customers clauses, and again was right to do so.

498. Contrary to the assertion in paragraph 172 of Hiscox's Appeal Case, not only do each of the above examples relied on by the Court below provide a sound basis for the Court's conclusion as to the meaning of "*interruption*", they demonstrate that the conclusion is necessary: Hiscox's construction of "*interruption*" is incompatible with these clauses providing cover on any commercially sensible basis.

499. Hiscox also seeks to argue (at paragraph 171 of its Appeal Case) that a number of the BI cover clauses in Hiscox 1 relate to circumstances which "*could*" cause a complete cessation in business activities. It lists: insured damage, denial of access, NDDA, bomb threat, public utilities, telecommunications, online marketplaces, public authority, cyber-attack, equipment breakdown and loss of licence. But, of course, the fact that a clause provides cover in respect of circumstances which "*could*" cause a complete cessation is no basis at all for a finding that the cover will *only* be triggered where there has been a complete cessation.

500. It is notable that where a total cessation is envisaged, that is made expressly clear in the clause, as with the cover for 'Bomb threat' where only "*total inability to access the insured premises*" triggers the cover, and Hiscox's liability is limited "*to the actual period that total access is denied*". More often, whilst the clauses would indeed respond to a complete cessation, there is no basis for concluding that the parties intended that they would *only* respond in such cases and would not respond to cases involving business interruption in the sense of disruption to or interference with the ordinary operations of the insured. For example, the 'Denial of access' clause includes cover where insured damage in the vicinity of the premises "*prevents or hinders*" the insured's access. It is most unlikely that damage which merely hinders access would cause a complete cessation of activities: the clause is clearly intended to respond to disruption falling short of complete cessation. A similar point can be made in relation to the NDDA clause, which is triggered by "*a denial in access or hindrance in access*". Likewise, failures in the supply of telecommunications, internet services or online market places, or cases involving cyber-attack, may all give rise to an interruption to a business's normal operations falling well short of a complete cessation of activities, and in each case on their correct construction the clauses would respond.

501. As already observed above, there is no practical difference between Hiscox's primary case and its so-called 'alternative case'. All of the points already made above apply equally to that case. The criticism in paragraph of [179] of Hiscox's Appeal Case that the Court did not make clear that "*interruption*" does not extend to "*any kind of disruption to a business, however slight, and that mere*

disruption to or alteration in normal activities would not be sufficient" is not a fair one. The Court (correctly) construed "*interruption*", as it was asked to do, and (correctly) held that whether there has been such an interruption will be a matter of fact in each case. The 'clarification' which Hiscox seeks to add has no basis at all in the judgment, and nor – for the reasons given above – is it correct as a matter of interpretation of "*interruption*".

502. In paragraphs [183-184] of its Appeal Case, Hiscox contends that Category 3 and Category 5 businesses cannot be said to have sustained an "*interruption*" because: (1) Category 3 businesses were permitted to remain open and trade, and under Regulation 6(2)(a) of the 26 March Regulations people were permitted to visit them as customers; and (2) Category 5 businesses were not required to close, and (a) employees who could not reasonably work at home were permitted to travel to work (under Regulation 6(2)(f)), whereas (b) employees who could work at home would continue the insured's business there.

503. As to these contentions, the question of whether any Category 3 or Category 5 business has suffered an "*interruption*" is one of fact in each case, the question being whether the business has suffered 'business interruption' in the sense of disruption or interference to its business activities at the insured premises. That said, it is important that Hiscox's mischaracterisation of the general position relating Category 3 and 5 businesses does not go uncorrected:

503.1. Category 3 businesses were permitted by Regulation 5(1) of the 26 March Regulations to stay open. However, they had to comply with UK Government advice on social distancing, safety and hygiene (and to the extent they could not comply may have had to cease trading altogether). In addition, customers were only permitted to visit Category 3 businesses insofar as doing so complied with Government guidance and Regulation 6(2)(a). In particular, they were restricted to visiting Category 3 businesses for the purposes of obtaining "*basic necessities*" such as food and medical supplies and supplies for the "*essential upkeep, maintenance and functioning of the household*" (and would commit an offence if they left home to visit a Category 3 business for an unpermitted purpose). The upshot in many cases will have been that Category 3 businesses suffered material disruption to their trading and will not have been able to carry on their operations in the manner they ordinarily would have. In any such case there is likely to have been an "*interruption*" in the relevant sense.

503.2. Category 5 businesses were not mentioned in the 21 or 26 March Regulations. To the extent such businesses remained open (fully or partially), they too they had to comply with UK Government advice on social distancing, safety and hygiene, and on the

Government's guidance and rules on staying at home. Since the reality was that many employees of Category 5 businesses were able to work from home, they had no reasonable excuse for travelling to work. Hiscox is wrong to say that if work could reasonably be done at home then the insured's business or business activities did not sustain an interruption. The fact that an insured may be able to restart some of its activities from another location does not mean that its normal business or business activities have not been interrupted: it simply means that the insured has taken efforts to minimise losses, as required by the policies (and if it has increased cost of working cover, such increased costs will be recoverable). Any contributions made by home working to gross profits will be taken into account in the quantum calculation. Again, the likely upshot in many cases will have been that Category 5 businesses suffered material disruption to their normal operations, and in any such case there is likely to have been an "*interruption*" in the relevant sense.

504. For the reasons given above, the Court is asked to dismiss Hiscox's appeal on both its primary and alternative basis.

Hiscox Ground 8[548]: was Regulation 6 capable of being a "*restriction imposed*"?

505. Hiscox Ground 8 is concerned with whether the restrictions on the movement of individuals in Regulation 6 of the 26 March Regulations are capable of being "*restrictions imposed*" for the purposes of the Hiscox1-4 'hybrid' clause.

506. Regulation 6 contains (in Regulation 6(1)) the general prohibition: "*no person may leave the place where they are living without reasonable excuse*". Regulation 6(2) contains a non-exhaustive list of reasonable excuses. The main excuses for present purposes are: (in 6(2)(a)) the need to obtain "*basic necessities*" such as food and medical supplies and supplies for the essential upkeep, maintenance and functioning of the household, and (in 6(2)(f)) "*the need to travel for the purposes of work … where it is not reasonably possible for that person to work … from the place where they are living*". Under Regulation 9(1),(4) any contravention of a requirement in Regulation 6 is an offence punishable on summary conviction by a fine. In addition, Regulation 10(1) confers powers on authorised persons (constables, police community support officers, and other persons designated by the Secretary of State) to issue a fixed penalty notice to anyone the authorised person reasonably believes has committed an offence under the Regulations.

[548] {A/6/140}.

507. The essential issue which this Ground of Hiscox's appeal raises is whether, in order to qualify as "*restrictions imposed*", the restrictions in question must be directed at the insured and its use of the premises. The Court below held that they do not, finding that it is sufficient that the restrictions have the effect that the insured is unable to use the premises for its business purposes, irrespective of whether the restrictions are specifically directed to that end.[549] It followed that the restrictions imposed by Regulation 6 are capable of being "*restrictions*" in the relevant sense[550] (albeit the Court also found that cases in which Regulation 6 would cause an "*inability to use*" premises would be "*rare*": this aspect of the decision depends on the Court's restrictive interpretation of "*inability to use*" and is challenged by the FCA under Ground 3 of its appeal).

508. The Court's decision on this issue gives the correct effect to the objective meaning of the words used in the clause. The clause contains no words of limitation narrowing the meaning of "*restrictions imposed*" to those specifically directed at the insured and its use of the premises. The focus of the clause is on the consequences of the restrictions imposed, not their type or target. Nor is there any good basis for thinking that the parties would have wished to exclude from the scope of the clause restrictions which cause the insured to be unable to use its premises albeit that was not their direct purpose. On the contrary, where such restrictions have the very effect the clause protects against (i.e. rendering the insured unable to use its business premises), one would expect the parties to wish to achieve the result which, as the Court found, the clause provides for.

509. Hiscox identifies five (supposed) reasons why, contrary to the Court below's findings, the word "*restrictions*" is to be treated as referring only to restrictions directed at the insured and its use of the premises.[551]

510. Hiscox's first point is said to arise from 'the nature of the policy': it is said that the Hiscox BI wordings are an adjunct to property cover and that this "*signals*" that the restrictions referred to in the Public Authority clause are restrictions concerned with the insured's use of the premises.[552] There is nothing in this point. At most, the fact that Hiscox's BI cover is one element within broader property cover forms part of the commercial context in the broadest sense, but it is far too diffuse and vague a factor to influence the meaning of "*restrictions*" in the clause. The clause does in fact require a link between the business interruption and the insured

[549] Declarations Order para 17.4 {C/1/13}; Judgment [269].
[550] Declarations Order para 17.4 {C/1/13}; Judgment [270].
[551] Hiscox's Appeal Case para 153ff {B/6/194}.
[552] Hiscox's Appeal Case para 154 {B/6/195}.

property, but the link is supplied by the fact that it is only where the insured is unable to use the property that the cover is triggered. The mere 'nature' of the policy provides no basis for reading in some further requirement that "*restrictions*" must mean restrictions directed at the insured's use of the property.

511. Hiscox's second point relates to 'the language of the clause': specifically, it is said that because the clause is directed at the insured's use of the premises, the customer's use is not relevant.[553] This misses the point entirely. Where the insured's business activities involve the attendance of customers, clients and/or employees at the insured premises, and restrictions imposed by a public authority prevent their attendance, the insured will be unable to use the premises for those business purposes, and its inability will be "*due to*" the restrictions. It is plainly the insured's inability to use the premises which the Court (correctly) had in mind when considering this issue, as is evident from the language used in Judgment [269]: "*leading … to a complete inability to use the shop for business purposes*" (underlining added). That the customers', clients' and/or employees' own purposes for attending the premises may also be frustrated by the restrictions is beside the point and formed no part of the FCA's case or the Court's reasoning.

512. Hiscox's third point is to the effect that the meaning of "*restrictions*" is to be found in 'the nature of the matters covered in the other sub-clauses' (i.e. sub-clauses (a) to (e)). Its submission is that those matters are all events "*which the parties would have had in mind as posing a risk of restrictions directed at the premises and their use*", and that the clause is only concerned with a restriction which "*directs*" the insured that it "*may not use*" the premises "*for one of the five reasons*" in sub-clauses (a) to (e).[554]

513. That submission is wrong both as an assessment of the objective intentions of the parties and as a matter of the meaning of the words used. As to the parties' objective intentions, if one asks what "*restrictions*" the parties had in mind, the answer supplied by the clause is 'restrictions having the effect which the clause provides protection against' – that is, which render the insured unable to use the insured premises for its business purposes. As to the words used, Hiscox seeks to interpret them in a manner which would impose a far narrower relationship between the 'inability', the 'restrictions' and the matters in sub-clauses (a) to (e) than the language of the clause provides for as a matter of ordinary meaning. The relationship contemplated by the clause is "*inability to use*" the premises "*due to*" restrictions imposed "*following*" one of (a) to (e). Contrary to Hiscox's interpretation, there is no warrant for reading

[553] Hiscox's Appeal Case para 155-6 {B/6/195}.
[554] Hiscox's Appeal Case para 157 {B/6/195}.

those words as requiring the "*restrictions*" to be limited to those which 'direct' the insured that it 'may not' use the premises 'because of' any of (a) to (e).

514. Contrary to paragraph 158 of Hiscox's Appeal Case, the example of the police cordon given by the Court below in Judgment [269] was an apposite illustration (in addition to the one which the present case provides) of a situation in which the clause would be triggered albeit the restriction is not directed at the insured and its use of the premises. The example involved a murder or suicide in the street outside the insured's premises, causing the police to put up a cordon which prevents the public from accessing the premises, such that the insured is unable to use the premises for business purposes. Hiscox's criticism of the example gets it entirely wrong. In particular, it is wrong to say that "*an important part*" (or indeed any part) of the purpose of the cordon is "*precisely to prevent the use by the insured of its premises inside the cordon*" and that "*it is a restriction directly aimed at those with premises inside the cordon*". It is not. The cordon is directed at the public and the restrictions it imposes are restrictions on the public (to prevent contamination of the site of the crime) the effect of which is to prevent them from crossing the cordoned area and so getting to the insured premises. As the Court correctly said, the effect of the cordon would be to keep the public away, but the cordon is not directed at the insured's use of its premises. The insured's resulting inability to use its premises is an entirely indirect effect of the restrictions, not the purpose of them.

515. Hiscox's observations in paragraph 159 of its Appeal Case[555] regarding Regulation 6 assume the correctness of its position that only restrictions directed at the insured's use of the premises will qualify as "*restrictions imposed*". Once it is recognised that restrictions which have an indirect impact on the insured's ability to use of the premises are also capable of being "*restrictions*" in the relevant sense, the observations in that paragraph are irrelevant.

516. Similarly, Hiscox's observations on the impact of Regulation 6 on Category 3 and 5 businesses in paragraph 160 of its Appeal Case are also flawed. The purpose of Regulation 6 was to place severe restrictions on the population's ability to leave home, including to visit or work from Category 3 and Category 5 businesses. Where an insured's business involves selling goods or providing services at its premises to customers or clients in person, restrictions which prevent its customers or clients from visiting the premises render the insured unable to use the premises for those purposes. The position is likewise where the insured's business involves its employees working at the premises and restrictions prevent the employees from attending the premises. Thus:

[555] {B/6/196}.

516.1. Category 3 businesses were permitted to remain open, but their customers were subject to the strict limitations imposed by Regulation 6(2)(a), preventing them from leaving home to shop other than to obtain "*basic necessities*". Thus a customer could go to a homeware or hardware shop to buy a necessary lightbulb (assuming all options in the home had been exhausted) but not a set of shelves, paint, a new hose or picture hooks. As a consequence of these limitations, many Category 3 businesses will have experienced a sharp reduction in the number of customers visiting their premises, and in the products those customers were able to buy lawfully. Category 3 businesses experiencing these reductions in footfall and trade were unable to use their premises for the ordinary purposes of their business "*due to [the Regulation 6] restrictions imposed by a public authority*".

516.2. Many employees, partners in and/or owners of Category 5 businesses were able to work remotely. In those cases it would have been extremely difficult to satisfy the 'not reasonably possible' test under Regulation 6(2)(f). Nor, in most cases, would the customers/clients of Category 5 businesses have the 'reasonable excuse' necessary under Regulation 6 to leave home to visit the business premises. Therefore, again, the effect of Regulation 6 in many Category 5 cases will have been that insureds were unable to use their business premises "*due to [the Regulation 6] restrictions imposed by a public authority*". The fact that Category 5 businesses were in many cases able to adapt to home-working (to a greater or lesser extent – the limitations should not be minimised), including interacting with customers and clients by home-to-home contact, is no answer to the point that Regulation 6 had the effect that these businesses were unable to use their business premises. Hiscox's reliance (in paragraph 160 of its Appeal Case) on the Court's comment in the final sentence of Judgment [415] that, since the Regulations were silent about Category 5 businesses, it cannot be said that restrictions on use of their premises were imposed by the Government is a red herring. The relevant restrictions in Regulation 6 were imposed on the public; their *effect* was an inability to use insured premises. As the Court accepted at the consequential hearing when making the declaration sought by the FCA and rejecting Hiscox's submission that [415] gave rise to any inconsistency with what it had said in relation to this clause, there is a distinction between the NDDA clause that the Court was considering at [415] and the clause under consideration here. The NDDA clause that the Court was considering at [415] required the denial or hindrance of access to have been "*imposed by any civil or statutory authority*", whereas the clause in question simply requires the inability to use to be "*due to*" the restrictions imposed. The NDDA clause does in terms require the direct

imposition of a denial or hindrance of access, whereas the words "*due to*" in this clause are merely requiring a causal impact.

517. Stripped of hyperbole, Hiscox's fourth point[556] is that at the time the policies were concluded it would not have been in the parties' contemplation that an insured business could be rendered unable to use its premises not by restrictions directed at and concerning the premises, but instead through the indirect impact of a measure such as Regulation 6. This obscures the real question, which is simply whether, as a matter of construction of the language of the clause, the "*restrictions*" it contemplates necessarily have to be directed at the insured's use of its business. If the answer to that question is 'no' (which it is, for the reasons above), then the fact that the Government's action in introducing Regulation 6 is unprecedented in the UK is beside the point: what matters is simply whether the events which have occurred are within the scope of the cover. In any event, it should be borne in mind that while the Regulation was unprecedented in the UK, the power to introduce it was not: the 26 March Regulations were made under existing statutory powers conferred on the Secretary of State for Health by sections 45C, 45F and 45P of the Public Health (Control of Disease) Act 1984.[557] The risks of epidemics and pandemics was also, of course, well known, and national lockdown was not an unprecedented response: in 2009, the population of Mexico was subjected to a five-day lockdown in response to the spread of Swine Flu.[558]

518. Hiscox's fifth point is that the Court's ruling creates (so it is said) surprising results. The only examples given in support of that contention involve extreme facts and it is somewhat far-fetched to say, as Hiscox seeks to, that they provide any serious basis for doubting the Court's conclusion. It is in any event to be doubted whether, in the situation posited by Hiscox, where the insured is a sole trader (and is, therefore, effectively the embodiment of the business), it really is at all surprising that a policy covering an inability to use business premises would respond where the individual concerned is unable to use the premises because of restrictions imposed on him/her personally rather than on the premises.

519. Finally, the observations in paragraph 163 of Hiscox's Appeal Case regarding the implications of the FCA's appeal regarding "*inability to use*" should be taken with a pinch of salt. Any insured seeking an indemnity under the Hiscox 'hybrid' clause has to bring itself within the various elements of the clause in order to recover. It is not the case that any insured will simply be able to 'point to' Regulation 6 to establish an "*inability to use*". Rather, the insured will have to

[556] Hiscox's Appeal Case para 161 {B/6/196}.
[557] {G/36/237}.
[558] Agreed Facts 7, paragraph 10(c) {D/11/1543}.

establish each element of the cover, including that it has suffered a material inability to use its premises for business purposes and that the inability was "*due to*" restrictions imposed by Regulation 6.

520. For the above reasons the Court is asked to dismiss this Ground of Hiscox's appeal.

G. RSA'S GENERAL EXCLUSION L: RSA GROUND 3[559]

Introduction

521. The Court below found that, on the correct construction of the policy, General Exclusion L[560] does not exclude claims arising out of the COVID-19 epidemic.[561] Had it been necessary to do so, it would have reached the same conclusion applying the *contra proferentem* principle.[562]

522. As the Court observed:

> "This exclusion has the hallmarks of one which has been included without detailed consideration of the extent to which its terms might, if applied literally, cut down specific covers provided in the insurance." (Judgment [115])

523. RSA accepts, as it must, that General Exclusion L cannot have been intended to be applied in accordance with its express terms. Those terms would exclude cover for loss and Damage due to (among other things in a wide-ranging list) "*epidemic and disease*", thereby negating all of the cover provided in respect of the occurrence of Notifiable Disease by the Infectious Disease clauses in Extension vii of RSA3,[563] which cannot have been the parties' intention. However, RSA contends that by a process of conveniently selective excision, the exclusion can be construed so as to apply only to "*epidemic*" and, on that basis, should be interpreted as excluding losses due to the COVID-19 epidemic, whilst otherwise preserving cover for 'Notifiable Disease'.

524. Far from being a conscientious and fair reconciliation of the conflicts and contradictions presented by General Exclusion L as RSA claims, its proposed construction is artificial and unfair, based on an unprincipled picking and choosing between convenient and inconvenient words. The Court below was right to reject it, both as a matter of conventional interpretation

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559 {A/9/22}.
560 Relevant terms of RSA3 are at Judgment [83-87] (General Exclusion L is at [86] but for convenience is also set out below); for the policy, see {C/16/1292}.
561 Declaration Order para 29.3 {C/1/24}; Judgment [114-117].
562 Judgment [118].
563 Extension vii is at Judgment [85]; for RSA3, see {C/16/1237}.

of the policy and, if necessary, by the application of the *contra proferentem* principle, and this Court is asked to dismiss the appeal from that decision.

Conventional interpretation

525. For convenience, General Exclusion L is set out here:

> L Applicable to all sections other than Section 5 – Employers' Liability and Section 6 – Public Liability Contamination or Pollution Clause
>
> a) The insurance by this **Policy** does not cover any loss or **Damage** due to contamination pollution soot deposition impairment with dust chemical precipitation adulteration poisoning impurity epidemic and disease or due to any limitation or prevention of the use of objects because of hazards to health.
>
> b) This exclusion does not apply if such loss or **Damage** arises out of one or more of the following Perils:
>
> - Fire, Lightning, Explosion, Impact of Aircraft
> - **Vehicle** Impact Sonic Boom
> - Accidental Escape of Water from any tank apparatus or pipe Riot, Civil Commotion, Malicious **Damage**
> - Storm, Hail Flood Inundation Earthquake
> - Landslide **Subsidence** Pressure of Snow, Avalanche Volcanic Eruption
>
> a) If a Peril not excluded from this **Policy** arises directly from **Pollution and/or Contamination** any loss or **Damage** arising directly from that Peril shall be covered.
>
> b) All other terms and conditions of this **Policy** shall be unaltered and especially the exclusions shall not be superseded by this clause.

526. The Court identified the following basic conflicts between the General Exclusion (if applied literally) and the cover granted in Extension vii:[564]

526.1. The General Exclusion states that the policy "*does not cover*" loss or Damage due to poisoning, but "*food or drink poisoning*" are among the illnesses constituting 'Notifiable Disease' in respect of which Extension vii expressly grants cover. This conflict now appears to be acknowledged by RSA, but RSA is wrong to dismiss it as "*irrelevant*"[565]. It is in fact an integral aspect of the conflict between General Exclusion L and the cover granted in Extension vii in respect of Notifiable Disease, and RSA's failure to explain how, on its interpretation, the conflict could be addressed (and the principled basis for doing so) is a notable omission.

526.2. Similarly, the General Exclusion states that the policy "*does not cover*" loss or Damage due to "*epidemic and disease*". This obviously conflicts with the cover granted in Extension vii in respect of Notifiable Disease which, as the Court explained, includes notifiable diseases which may give rise to an epidemic, including diseases already known (for

[564] In Judgment [115-116].
[565] RSA's Appeal Case para 57-58 {B/9/314}.

example, SARS) and any which may newly occur during the policy period (as has happened with COVID-19). Thus, the cover granted in Extension vii includes cover for losses following both disease and epidemic, in direct conflict with the General Exclusion.

527. It is, as the Court below said, impossible to accept that the parties intended the policy expressly to give cover in respect of losses following from poisoning, disease and epidemic with one hand, only to take it away again with the other by virtue of the list of matters in General Exclusion L. The Court found the solution to this problem in sub-clause L(b)(bis), holding that, correctly construed, the effect of the sub-clause is to provide that the terms of General Exclusion L are not intended to override express grants of cover elsewhere in the policy (including in particular the disease clauses in Extension vii). Thus, the sub-clause anticipates and caters for precisely the possibility that, without it, General Exclusion L might not fit well with other terms of the policy, and ensures that the absurdity and unfairness that would otherwise arise if an express grant of cover were to be eliminated by the General Exclusion is avoided.

528. The Court's solution reconciles, conscientiously and fairly, the apparent conflicts between Extension vii and the General Exclusion. Contrary to RSA's Appeal Case at [58(a) and (e)], this does not involve 'striking down' the General Exclusion, nor does it amount to drawing a red line through the word "*epidemic*" in the General Exclusion. The exclusion remains entirely intact and applicable according to the terms of the Policy, with sub-clause L(b)(bis) helping to regulate its operation by ensuring that express grants of cover are preserved.

529. By contrast, RSA's proposed interpretation *does* involve drawing red lines through words in the exclusion. "*Poisoning*" would have to go, as would the words "…*and disease*" from the conjoined phrase "*epidemic and disease*". RSA identifies no principled basis for this approach. The reasonable person, knowing (as RSA accepts) that the exclusion cannot be intended to apply according to its terms, would not think that the fair solution is to be found by excising the words "*and disease*": "*epidemic and disease*" are obviously intended to be coupled in the exclusion. Nor would the reasonable person consider that the fair solution involves (as RSA's solution does) manipulating the exclusion to preserve the cover provided in Extension vii in respect of a Notifiable Disease to the extent that it does not give rise to an epidemic, but to eliminate cover if and when the disease reaches epidemic status. There is nothing fair (or conscientious) about such a result.

530. RSA contends that, contrary to the Court's construction, L(b)(bis) should be interpreted as "*intended to complement L(a)(bis)*"[566], by which it appears to mean that L(b)(bis) is to be treated as a limitation on the effect of L(a)(bis). But that interpretation cannot be right. Firstly, if that had been the intention, the draftsman would not have put the L(b)(bis) language in a separate sub-clause, but would instead have included it at the end of L(a)(bis). Secondly, RSA's interpretation makes no sense of the words "*by this clause*" in L(b)(bis) which are plainly intended to refer to the whole of General Exclusion L and not merely L(a)(bis). As the Court below held, L(b)(bis) is intended as a saving or carve-out applicable to the entirety of General Exclusion L and is to be understood as meaning that the terms of the general exclusion are not intended to negate an express grant of cover in the policy.

531. Whilst the Court's solution to the conflicts presented by General Exclusion L is, the FCA submits, correct, an alternative approach proposed by the FCA at trial should be mentioned. This focuses on the correct interpretation of sub-clause L(a)(bis) which provides a carve-out from General Exclusion L for loss arising directly from any Peril not excluded from the Policy if the Peril arises directly from Pollution and/or Contamination. The terms "Peril" and "Pollution and/or Contamination" are not defined, but from the context "Peril" is simply a reference to any insured peril under the policy, which includes the disease clauses in Extension vii. "Pollution and/or Contamination" is a reference back to the first sub-paragraph of the exclusion (i.e. that under the heading "**Contamination or Pollution Clause**"). Thus the effect of L(a)(bis) is to provide that the General Exclusion does not apply where the matters identified under the heading "Contamination or Pollution Clause" (including "*poisoning*" and "*epidemic and disease*") arise directly from a peril in respect of which cover is expressly granted by the policy. In other words, again the intention is to provide that the General Exclusion is not intended to cut back the cover for perils it directly overlaps with. If this Court were to disagree with the construction of General Exclusion L preferred by the Court below, this alternative construction provides the other route to resolving the conflicts which the General Exclusion otherwise creates.

Contra proferentem

532. If necessary, this is also an appropriate case for an interpretation of General Exclusion L *contra proferentem*, applying the principles discussed in *Impact Funding Solutions Ltd v Barrington Services Ltd* [2016] UKSC 57, [2017] AC 73 by Lord Hodge (in particular at [5]-[7]) and Lord Toulson (in

[566] RSA's Appeal Case para 59 {B/9/314-315}.

particular at [35]),[567] and as considered and summarised by Peter MacDonald Eggers QC (sitting as a Deputy High Court judge) in *Crowden v QBE Insurance (Europe) Ltd* [2017] EWHC 2597 (Comm); [2018] 1 Lloyd's Rep IR 83 at [62]-[65].

533. There should be no dispute that, in this context, RSA[568] is the *proferens* against whom the principle should operate. The *proferens* may be either:

533.1. the party who drafted the wording ("*whoever holds the pen creates the ambiguity and must live with the consequences*", per Binnie J in *Co-operators Lift Insurance Co v Gibbems* 2009 SCC 59)[569]; or

533.2. the party in whose favour the clause operates ("*where there is any doubt as to the construction of any stipulation in a contract, one ought to construe it strictly against the party in whose favour it has been made*", per Brett MR in *Burton v English* (1883) 12 QBD 218)[570].

534. Application of both or either of these principles to provisions which delimit the scope of coverage provided by an insurance policy (i.e. provisions intended to limit the scope of cover in favour of the insurer) requires ambiguity to be resolved against the insurer. *"[T]he insurers frame the policy and insert the exceptions for their own benefit*" (per Lord Hodge in *Impact Funding Solutions Ltd v Barrington Services Ltd* [2016] UKSC 57; [2017] AC 73 at 79C-E). Lord Hodge correctly identified that in the case of insurance contracts, both means of identifying the *proferens* will result in the application of the principle in favour of the insured. That the insurer will "frame the policy" simply means that the insurer determines the wording which reflects the insurer's choice as to the scope of the policy. The wording is in substance that of the insurer. Exclusions are included "for their own benefit", as are limitations (or alleged limitations) in the scope of cover defined by the insuring provisions or definitions of the policy. It is trite that an exclusion of coverage (in whatever contractual guise) operates in favour of the insurer and against the insured.

535. Thus, whichever approach is used will identify RSA as the *proferens*. The commercial reality of the policy is that it is offered on terms determined by (or on behalf of) RSA and which define the scope of the policy in the manner which most benefits RSA. There is no room for any finding other than that RSA is the *proferens* in such circumstances. The situation may differ where the evidence shows that a broker has been involved in negotiating bespoke terms as the agent

[567] Excerpts from which are at Judgment [72]-[73].
[568] RSA3 is underwritten by Eaton Gate Commercial, a Managing General Underwriter, on behalf of RSA: Judgment [82].
[569] {G/97/2093}.
[570] {G/49/443}.

of an insured, but in the present case the policy is a standard form policy and the fact that policyholders may have bought the insurance through brokers is irrelevant.

536. In RSA3, although, as the Court found, the construction issue can be resolved against RSA without resort to a *contra proferentem* construction, if this Court disagrees then at the very least genuine ambiguity arises in the interpretation of the policy, and real doubt is created, by the apparent impact of General Exclusion L on the cover granted by Extension vii and as to the intended effect of L(a)(bis) and L(b)(bis). The literal effect of General Exclusion L (and indeed its effect as construed by RSA) would exclude a substantial part of the cover which is intended to be provided by Extension vii: it is impossible to give full effect to the Extension whilst also giving full effect to the General Exclusion, and one of them must give way. Applying the *contra proferentem* rule to resolve this doubt and ambiguity, the policy should be construed so as to preserve the cover granted in Extension vii, and the provisions of General Exclusion L should be construed against RSA as necessary so as not to diminish that cover in any respect.

H. CONCLUSION

537. The Supreme Court is respectfully invited to dismiss each Ground of Appeal of each of the insurer Appellants for the reasons set out in this Written Case.

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