

OPUS2

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

Day 1

October 2, 2020

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

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

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

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

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

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

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

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

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

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

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

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

19 LORD JUSTICE FLAUX: No, okay.

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

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

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

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

13 Submissions by MR EDELMAN QC

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

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

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

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

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

12 The limited issue --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 I'll come to.

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

5 MR EDELMAN QC: Yes, my Lord.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 Anyway, Mr Edelman, we have your submission.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 My Lord, those are my submissions on prevalence.
22 LORD JUSTICE FLAUX: Thank you, Mr Edelman. Now, who is
23 making the running for the insurers on this point?

24 Submissions by MR TURNER QC
25 MR TURNER QC: I am, my Lord. Can I take those in order,

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

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

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

18

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

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

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

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

19 LORD JUSTICE FLAUX: Yes.

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

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

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1 a fact-finding tribunal.

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

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

11 LORD JUSTICE FLAUX: That's that point.

12 MR TURNER QC: That's that point.

13 LORD JUSTICE FLAUX: Okay.

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

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

25 My Lord, the reservation which insurers would still

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

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

22

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

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

24

1 within the Relevant Policy Area ... The Underlying Data
 2 would also confirm the cumulative number of Reported
 3 Cases up to and including the particular date within the
 4 Relevant Policy Area, although this makes no allowance
 5 for those who have recovered from COVID-19.”
 6 Then there’s footnote 21, which deals with the
 7 infectious period. So you’ll see what’s said in the
 8 agreed facts, and all we’re trying to do is just reflect
 9 the agreed facts in paragraph 8.4. So we say they
 10 should be in there and the court should be concerned to
 11 record what has either been agreed or decided by the
 12 court, and if fact finders want to understand it better,
 13 or there’s a dispute about what it means, they can refer
 14 to the judgment for a better understanding.
 15 LORD JUSTICE FLAUX: Right, okay. Thank you very much.
 16 We’ll just retire briefly to our parallel room. So
 17 don’t go too far away, anybody. I’ll just turn my
 18 camera off and we’ll be a minute or two.
 19 (11.15 am)
 20 (Pause)
 21 (11.18 am)
 22 LORD JUSTICE FLAUX: Right, we’ll just wait for my Lord to
 23 join us.
 24 Ruling
 25 LORD JUSTICE FLAUX: Right, so far as paragraph 8.2 is

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

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

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

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

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

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

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

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1 stated on the sheet at {N/11}, which would suggest it's
 2 a special point of my clients. That's not right. We
 3 were the ones who communicated it on behalf of insurers.
 4 But as it happens it is me dealing with it, my Lord.
 5 As Mr Edelman says, we accept that the words we seek
 6 to insert in 11.2(a) are not in the judgment, but we say
 7 that it's important to make clear what the judgment
 8 means in relation to this scenario. I'm not sure why my
 9 learned friend says that it's not important. It may
 10 well be important to — it may well be very important to
 11 some policyholders.

12 The difference relates to a particular scenario that
 13 could arise with disease clauses. Perhaps before
 14 I explain that, maybe I just say this as well in case
 15 I forget later: the question I'm about to raise is
 16 similar to one that arises on the trends clause, for
 17 which your Lordships will be treated to an upgrade of
 18 counsel on the defendants' side, and it may be
 19 your Lordships will prefer to decide it after having
 20 heard those submissions as well.

21 But going back to this clause, the scenario which
 22 causes an issue that needs to be resolved is where the
 23 chronology runs as follows:

24 First, there's a relevant government response to
 25 COVID such as the 21 March regulations or the 26 March

1 regulations. Those have an impact on a policyholder's
 2 business but at that stage there is no COVID in the
 3 relevant radius.

4 As from some later date, maybe 15 April just for the
 5 sake of argument, it is established that there is COVID
 6 within the radius of that policyholder.

7 The question of substance is whether your Lordships
 8 have held that regulations passed on 21 or 26 March, and
 9 the effect of those regulations on the policyholder's
 10 business, were following, to take the RSA 3 wording, or
 11 as a result of, to take the Argenta wording,
 12 an occurrence of COVID within the radius on, for
 13 example, 15 April.

14 Now, we submit that your Lordships have not held
 15 that, but in any event, whether I'm right about that or
 16 not, it is necessary for insurers and policyholders
 17 alike to know whether or not you have held that. This
 18 judgment is undoubtedly relevant to the question of what
 19 happens on that scenario, and it is essential to know
 20 what your Lordships in fact have said about it, whereas
 21 the FCA's draft declaration and, as I understand it,
 22 supported by Mr Edelman's oral submissions just now,
 23 seem to leave this point open for future argument which,
 24 in our submission, is the worst of all possible worlds.

25 You may well be right that it's a scenario —

1 MR JUSTICE BUTCHER: Mr Salzedo, I think one of the points
 2 that Mr Edelman has made, or at least just made, is that
 3 it is at least possible to conceive that the
 4 restrictions were continued after the date even if the
 5 first case of COVID within the radius was at some
 6 subsequent point after the initial institution of the
 7 restrictions, that they may have been continued by
 8 reason of such COVID, and I'm not sure that that is
 9 an issue which is fully catered for in your proposed
 10 changes.

11 MR SALZEDO QC: Well, my Lord, no. We are seeking to
 12 persuade your Lordships that what you have decided so
 13 far is not that. If I'm wrong about that, then it may
 14 be that the FCA ought to be proposing some wording, or
 15 your Lordships will give us some wording, expressing
 16 whatever your Lordships have decided about this.

17 But I'm seeking to persuade your Lordships at the
 18 moment that you have certainly not decided that, as
 19 a matter of generality, cases on 15 April caused
 20 restrictions that were made earlier than that, and I —

21 MR JUSTICE BUTCHER: My immediate reaction is we haven't
 22 decided that, but we equally haven't gone into the
 23 question of whether they may have been continued because
 24 of that. We just haven't dealt with those.

25 LORD JUSTICE FLAUX: We haven't dealt with an issue as to

1 whether or not there might be coverage under particular
 2 policies in the scenario which you've postulated. It
 3 just wasn't argued before us at all.

4 Presumably, Mr Salzedo, looking at the position of
 5 your particular clients, this is an Isles of Scilly
 6 point, isn't it? Because the Isles of Scilly didn't
 7 have any COVID but it now does have COVID. So I suppose
 8 that if there are policyholders of Argenta who make
 9 a claim who own holiday cottages in the Isles of Scilly,
 10 this point may come up, but the difficulty that I see is
 11 that we just haven't explored it at all.

12 Then my Lord's point about continuation, I can see
 13 the force in that, but we would need detailed
 14 submissions from those affected on this point, which we
 15 don't have.

16 MR SALZEDO QC: At the moment, my Lord, assuming then that
 17 I don't need to persuade your Lordships through the
 18 judgment of the proposition that your Lordships did not
 19 decide, that occurrences backwardly caused earlier
 20 restrictions, assuming that, then what the difficulty is
 21 with 11.2(a) as drafted by the FCA is it does appear to
 22 imply that any restrictions caused by COVID in the UK
 23 are necessarily among those to be taken out of the
 24 counterfactual when considering basic causation,
 25 including those which were imposed earlier.

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

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

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

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

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

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1 it's Mr Turner's point, to deal with it.

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

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

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

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

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

25 But the FCA's formulation requires us to strip out

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1 COVID anywhere in the world, and we say that is wrong,
2 it's inconsistent with the agreed test on disease
3 clauses, and it's inconsistent with your judgment. It's
4 a short point.

5 LORD JUSTICE FLAUX: Mr Edelman?

6 Submissions in reply by MR EDELMAN

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 the judgment. This is 20 March. In the second
2 paragraph there:
3 "... we are collectively telling ... cafés, pubs,
4 bars, restaurants to close tonight, as soon as they
5 reasonably can, and not to open tomorrow."
6 And then:
7 "... nightclubs, theatres, cinemas, gyms ... to
8 close on the same timescale".
9 Then the 21 March regulations were promulgated which
10 followed that up with the formal legislation. That's
11 the point, isn't it? That to the extent that a business
12 closed, say, at 5 o'clock on the 20th, so — I can't
13 remember what — this is probably about 5. So let us
14 say that the relevant pub closed immediately and not on
15 the following day, I think I would read what Mr Gaisman
16 is saying as saying that it would not be said that the
17 business was lost on the night of the 20th meant that —
18 sorry, it would not be said that it was a part of the
19 trend that the business had already closed.
20 MR LYNCH QC: My Lord, absolutely, and we would regard that
21 as entirely correct on the basis of the judgment, but
22 also just correct on how the policy should operate and
23 how it should operate in principle.

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

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

Submissions by MR GAISMAN QC

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

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

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

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

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1 before your Lordships, but I've said it and we will, of
2 course, stand by it.
3 LORD JUSTICE FLAUX: Yes. We don't know, or I don't know
4 yet, Mr Justice Butcher and I don't know yet, to what
5 extent other insurers accept the same point. But, as
6 you rightly say, Mr Gaisman, it wasn't the subject of
7 argument at trial, was it? I don't remember it being
8 argued, anyway.
9 MR GAISMAN QC: No, and what I have done is, in our skeleton
10 argument, correct the attribution to us of an argument
11 that, as far as I'm aware, having taken instructions, we
12 have never made and would not make and are not making.
13 Other insurers will take their own position. This
14 doesn't need to be the subject of a declaration but I am
15 quite happy to have stated Hiscox's position on the
16 record.

17 LORD JUSTICE FLAUX: Yes, thank you.

Submissions by MR LYNCH QC

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

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

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

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

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1 whether this matter goes further.

2 Not everybody will have heard Mr Gaisman's very
 3 helpful explanation. Not everybody will have read
 4 paragraph 35.2 of the Hiscox skeleton.

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

17 Hiscox does not object to the point of principle.
 18 In fact it's their proposition. No other insurer.

19 MR GAISMAN QC: As yet objected, and of course they may, but
 20 they haven't so far.

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

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

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

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

9 LORD JUSTICE FLAUX: No, thank you very much, Mr Lynch.

10 MR LYNCH QC: Thank you.

11 LORD JUSTICE FLAUX: Mr Gaisman?

12 Submissions by MR GAISMAN QC

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

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

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

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

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1 LORD JUSTICE FLAUX: Well, not abandoned it, but hasn't —

2 MR GAISMAN QC: Pressed it.

3 LORD JUSTICE FLAUX: — pressed it.

4 MR GAISMAN QC: Right.

5 MR EDELMAN QC: My Lord, can I just add one qualification?

6 I apologise sincerely for interrupting Mr Gaisman, but
 7 it's been pointed out to me that that should not have
 8 applied to the last sentence which, I think, is
 9 reflective of the judgment.

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

12 MR EDELMAN QC: That was my mistake.

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

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

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

22 LORD JUSTICE FLAUX: Right.

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

25 The main issue that now exists between the FCA and

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1 Hiscox is at the top of the page. But can we just read
2 from the previous page in the red? The previous page,
3 please {N/11/7}:

4 "It is in principle appropriate for the
5 counterfactual to take into account the continuation of
6 that measurable downturn and/or increase ... as a trend
7 or circumstance ... in calculating the indemnity payable
8 in respect of the period during which the insured peril
9 was triggered and remained [over the page please]
10 operative, but only if the particular effect amounts to
11 a trend or circumstance (as required under the
12 particular clause)..."

13 So far so good. And then these words:
14 "... and is sufficiently distinct from the insured
15 peril."

16 Now, that is completely inconsistent with
17 your Lordships' judgment, and we'll look at that if we
18 really need to, because your Lordships remember that you
19 gave the example of the collection going down by 20% in
20 the case of Ecclesiastical, and you explain that the
21 reason why that was not recoverable was the same as your
22 reasoning in relation to Arch, and your reasoning in
23 relation to Arch specifically dealt with what I might
24 call the gathering storm of the insured peril.

25 I've expressed that very compendiously, but if

1 your Lordships would like to look at the...
2 LORD JUSTICE FLAUX: Well, Mr Gaisman, the example that was
3 posed in argument was the example derived from
4 Orient Express of the hurricane --

5 MR GAISMAN QC: Yes.
6 LORD JUSTICE FLAUX: -- where the hurricane strikes, but
7 before the hurricane strikes, concern about the
8 hurricane coming is such that everybody cancels their
9 holiday in New Orleans and doesn't go there.

10 MR GAISMAN QC: Yes, but it's the same --
11 LORD JUSTICE FLAUX: What was said was: well, that can be,
12 as it were, guarded into the overall calculation of the
13 loss. The point was that to the extent that somebody is
14 anticipating an insured peril which hasn't yet occurred,
15 you can't recover in any way.

16 I suppose one way of looking at it would be in the
17 hurricane example, if the hurricane -- the hurricane is
18 feared, and everybody says: well, I'm not going to go to
19 New Orleans, but in fact the hurricane then heads off to
20 Bermuda and doesn't come anywhere near New Orleans,
21 there's never an insured loss.

22 MR GAISMAN QC: No, but what your Lordships were saying is
23 if it does strike New Orleans, then there is no recovery
24 in respect of the diminution before the occurrence of
25 all the elements of the composite peril.

1 LORD JUSTICE FLAUX: Precisely.
2 MR GAISMAN QC: If your Lordships need more help on it
3 I will show your Lordships the relevant paragraphs of
4 the judgment.

5 LORD JUSTICE FLAUX: I don't think you need to help us on
6 that, Mr Gaisman, because we're well aware of them.

7 MR GAISMAN QC: No, no, but what I mean by that is I don't
8 know whether I need to address your Lordships any
9 further on the unacceptability in the FCA's declaration
10 of the words "and is sufficiently distinct from the
11 insured peril", because that is the opposite of what
12 your Lordships said.

13 MR JUSTICE BUTCHER: What I need help on, Mr Gaisman, is
14 this: your paragraph 35.2, I think it is.

15 MR GAISMAN QC: Yes.

16 MR JUSTICE BUTCHER: You're going to say this is a slightly
17 different point.

18 MR GAISMAN QC: Yes.

19 MR JUSTICE BUTCHER: But what I need help on is whether that
20 concession or acceptance or non-argument of that point
21 is adequately reflected in insurers' position (b). If
22 that concession is giving effect to our judgment, how is
23 it reflected in the declarations which you suggest?

24 MR GAISMAN QC: My Lords, it isn't giving effect to
25 your Lordships' judgment. It is something that has

1 happened since the judgment, and that is one of the
2 reasons why I say it doesn't belong in a series of
3 declarations which are intended to give effect to
4 your Lordships' judgment.

5 Whether or not it's a concession or whether it might
6 be argued that it is a logical corollary of what
7 your Lordships have said doesn't matter. Hiscox have
8 taken this position from a loss adjusting point of view
9 and for other reasons. Because they are content to say
10 what they have said, they haven't examined what the
11 legal basis of it is.

12 That's their position. It may not have a legal
13 basis in your Lordships' judgment, it may be the
14 consequence of orthodox loss-adjusting principles, or it
15 may just be common sense. Who knows.

16 But your Lordship has undoubtedly, if I may say so,
17 raised a separate point, and I would like, if I may,
18 eccentric as it is, to ignore your Lordship's
19 interruption for a moment.

20 What I'm dealing with -- there are only these two
21 points, I think.

22 LORD JUSTICE FLAUX: Yes.

23 MR GAISMAN QC: But clearly the words "and is sufficiently
24 distinct from the insured peril" are a hangover of my
25 learned friend Mr Edelman's arguments that trends

1 clauses only dealt with, could only deal with,
2 extraneous matters like the ubiquitous though currently
3 rather difficult to find Michelin starred chef.

4 Now, it's quite obvious from the paragraphs that
5 I will take your Lordships to if necessary that
6 your Lordships rejected that argument because, although
7 in paragraph 389 you talk about the 20% diminution in
8 the collection without there expressly saying that it's
9 due to COVID, you cross refer to the same paragraphs,
10 the Arch paragraphs, 349 to 351, where the example
11 expressly is, because that was Mr Edelman's argument and
12 your Lordships there reject it.

13 So it can't be right to have the words "and is
14 sufficiently distinct from the insured peril" because
15 that completely undermines the essential position which
16 is that until -- I've taken this shortly, but the logic
17 of your Lordships' judgment is that -- and this is the
18 point on which we lost -- once you've got all three
19 matching elements present, then to that extent the
20 insurers had to, as it were, bear all the consequences
21 of those. The corollary is, until you do, the fact that
22 you've got one, in a composite peril which requires
23 three, is, in a sense -- well, in the relevant sense,
24 legally irrelevant.

25 Therefore to require something distinct effectively

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1 treats one element of the insured peril on its own as
2 an inadmissible trend, and that can't be right. That is
3 inconsistent with your Lordships' judgment.

4 Now, that's all -- however oft my saying that, it's
5 either right or wrong. So can I come back to my --

6 LORD JUSTICE FLAUX: It's paragraph 351, isn't it? It's the
7 last sentence of 351 which makes this absolutely clear.

8 MR GAISMAN QC: Well, actually, my Lord, to be honest, if
9 I had limitless time I would take your Lordships
10 carefully through 349 and in particular 350.

11 LORD JUSTICE FLAUX: Yes, I see that. I see that.

12 MR GAISMAN QC: Because this is the very argument that was
13 under consideration.

14 LORD JUSTICE FLAUX: Yes.

15 MR GAISMAN QC: But yes, the conclusion is in 351 and it's
16 reached as a matter of principle and on the trends
17 clauses, Hiscox's trends clauses by the way being
18 indistinguishable in this respect from Arch's.

19 So that point, really, should not be in the draft
20 declaration. So one simply comes back to the fact
21 that -- my Lord, Mr Justice Butcher's point. I've
22 expressed Hiscox's position and these declarations are
23 general declarations, and I'm not speaking for the rest
24 of the market or for my fellow defendants. That is our
25 position.

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1 My learned friends say, without explaining why, that
2 more people will read the declarations than the
3 policyholders will be aware of a formal statement of
4 Hiscox's position on the record. I rather doubt that.

5 LORD JUSTICE FLAUX: Well, your very fair -- I mean, I'll
6 describe it as a concession. Whether it's a concession
7 doesn't really matter, but your position in paragraph
8 35.2 of your skeleton argument, as elaborated in your
9 oral submissions, will no doubt feature publicly.

10 MR GAISMAN QC: Yes.

11 LORD JUSTICE FLAUX: So that Hiscox policyholders will know
12 where they stand in relation to Hiscox policies.

13 MR GAISMAN QC: Yes.

14 LORD JUSTICE FLAUX: Other insurers may or may not adopt the
15 same approach.

16 MR GAISMAN QC: Yes.

17 LORD JUSTICE FLAUX: Can we just go back to your, as you
18 described it, fetching blue text?

19 MR GAISMAN QC: Yes, it is quite fetching.

20 LORD JUSTICE FLAUX: And may I say how helpful it was to
21 have it all in different colours, rather than crossed
22 out, which the first draft was.

23 Anyway, there we are. It seemed to us when we were
24 looking at this wording in (b), Mr Gaisman --

25 MR GAISMAN QC: Yes.

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1 LORD JUSTICE FLAUX: -- that if we were to adopt this
2 wording it would be sensible to insert, after the words
3 "it is in principle appropriate" in the second line in
4 brackets "(subject to (a) above)" --

5 MR GAISMAN QC: Yes.

6 LORD JUSTICE FLAUX: -- just to clarify that it is
7 a question of fact in every case.

8 MR GAISMAN QC: Yes.

9 LORD JUSTICE FLAUX: And I imagine that's not objectionable.

10 MR GAISMAN QC: That is not objectionable and your Lordships
11 have the fact that (c) is in a different form.

12 LORD JUSTICE FLAUX: Yes, well, we've got that point as
13 well, yes.

14 MR GAISMAN QC: I don't think there's anything else I need
15 to trouble your Lordships on this point, unless you have
16 any questions.

17 LORD JUSTICE FLAUX: I don't have anything more. Does
18 Mr Justice Butcher have anything? No.

19 Right. Do any of the other insurers want to address
20 the court in relation to Mr Gaisman's paragraph 35.2 of
21 his skeleton and whether it should be put into -- in
22 some way encapsulated in the declarations even if it's
23 only in relation to Hiscox?

24 Submissions by MR KEALEY QC

25 MR KEALEY QC: My Lord, this is Gavin Kealey.

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

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

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

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

1 indeed, this debate has shown.
 2 MR EDELMAN QC: It may be, then, if your Lordships are
 3 prepared to make any declaration at all, it has to be
 4 something specific or not at all, and that's all
 5 I wanted to say.
 6 MR GAISMAN QC: My Lords, just before your Lordships retire,
 7 if your Lordships need to do so, I put forward the blue
 8 wording, and we're not really very happy with 11.3(c) in
 9 red on the previous page because that appears, at least
 10 in part, to raise the possibility of recovering outside
 11 the period of the insured peril for individual elements
 12 of it:
 13 "Unless the policy wording so requires, loss is not
 14 limited by the inclusion of any part of the insured
 15 peril in the assessment of what the position would have
 16 been if the insured peril had not occurred."
 17 Now, my learned friend doesn't explain which
 18 paragraph of the judgment that's intended to reflect,
 19 and it seems to us to be rather contrary to the fact
 20 that you need to have -- the fortuity, as it's put in
 21 paragraph 287, is against all three of these elements
 22 together. We submit that's capable of misleading third
 23 parties, and --
 24 LORD JUSTICE FLAUX: Do you have any difficulty, Mr Gaisman,
 25 with the FCA subparagraph (a)?

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

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

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

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

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

1 sentence of paragraph 231. Again, perhaps we ought to
 2 go back so my Lords can see it again, {N/1/74}, the last
 3 sentence I read:
 4 "If there were occurrences ... at different times
 5 and/or different places ..."
 6 We read that as the court emphasising its point. It
 7 didn't seek to subdivide what had happened in any
 8 particular area on this outbreak of COVID-19 into
 9 separate events, and we submit that QBE's alteration
 10 reads too much into the judgment.
 11 The point the court was focusing on, contrasting QBE
 12 2 and 3 with other policies, is, we submit, sufficiently
 13 reflected in our draft without QBE's additional words,
 14 and those are my submissions.
 15 LORD JUSTICE FLAUX: Thank you, Mr Edelman. Now, is
 16 Ms Ansell dealing with this?
 17 MS ANSELL QC: Yes, I am.
 18 LORD JUSTICE FLAUX: Yes.
 19 Submissions by MS ANSELL QC
 20 MS ANSELL QC: Sorry, can you see me now?
 21 LORD JUSTICE FLAUX: Yes.
 22 MS ANSELL QC: Thank you.
 23 My learned friend Mr Edelman is wrong to say that we
 24 only refer to paragraph 231 of the judgment. He took
 25 you to that bit and we do say that it's significant,

1 what you said about the event in that paragraph. But we
 2 also rely on paragraph 234, which you will find at
 3 {N/1/75}, when you in terms, at the end of that
 4 paragraph, say:
 5 "However, as we have said, the terms of Clause 3.2.4
 6 show that there is cover only if there is business
 7 interruption as a result of the 'event' of the person(s)
 8 sustaining that illness within the area. It is
 9 difficult to see how there could be such consequential
 10 interference if the disease was asymptomatic and
 11 undiagnosed."
 12 So we say that you recognised that there could be
 13 disease within the area but which was not having and not
 14 part of the event because it was not causing any
 15 particular interference.
 16 We then also rely on paragraph 235, and your final
 17 words in that paragraph, where we start:
 18 "... we consider that insureds would only be able to
 19 recover if they could show that the case(s) within the
 20 radius, as opposed to anywhere else, were the cause of
 21 the business interruption. In the context of this
 22 clause, it does not appear to us that the causation
 23 requirement could be satisfied on the basis that the
 24 cases within the area were to be regarded as part of the
 25 same cause as that causing the measures elsewhere, or as

1 one of many independent causes each of which was
2 an effective cause, because this clause, in our view,
3 limits cover only to the consequences of specific
4 events."

5 And we say that's a specific event of COVID-19
6 within the relevant policy area.

7 And you made a similar comment, we say, in respect
8 of QBE 3, which we find at 237, and is still on page 75
9 [N/1/76]:

10 "On these bases we consider this clause too is
11 confining cover to the consequences of certain
12 happenings, in particular specific occurrences of the
13 disease within the radius, as opposed to other
14 happenings or events, including instances of people
15 contracting the disease outside the radius."

16 So you will have seen from what my learned friend
17 said, it's common ground that the counterfactual retains
18 all cases of COVID-19 outside of the relevant policy
19 area. The dispute is about the cases within the
20 relevant policy area, and we say there's no proper basis
21 to take out -- as we read your judgment, to take out
22 these cases because they could be asymptomatic,
23 undiagnosed, which are not causing any specific
24 interference or interruption to the insured's business.

25 The cover is for the event, i.e. we say the

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1 particular case or outbreak of cases, which leads to the
2 particular interference. So, for example, you might
3 have an outbreak at a local factory or a local farm.
4 That is what should be stripped out and not the, if you
5 like, undiagnosed, asymptomatic, or the non-event
6 COVID-19.

7 We say what you shouldn't be doing -- or we believe
8 the effect of your judgment is you don't assume there's
9 no COVID-19 at all, and that what you end up with is
10 a COVID-19-free area, and we say you just take out the
11 event.

12 We say that's consistent with the latter part of the
13 declaration, which you see has been agreed, that you
14 only get cover for losses which would not have been
15 suffered had the particular occurrence or occurrences of
16 COVID-19 which triggered cover under the policy not
17 occurred. So, if you like, other things that were
18 continuing on in any event, other effects.

19 That's why we say you do need to include, or we say
20 it's proper reflection of your judgment that we have
21 "within and/or" within that declaration.

22 LORD JUSTICE FLAUX: Thank you.

23 Mr Edelman, any reply?

24 Submissions in reply by MR EDELMAN

25 MR EDELMAN QC: My Lords, there's nothing in the draft

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1 declaration the draft words that QBE seek to insert at
2 {N/11/10} which restricts it to asymptomatic or
3 undiagnosed cases; it's perfectly general, and what they
4 appear to be positing is that even for cases within the
5 area, each one, the outbreak of COVID within the area
6 can be subdivided into each individual competing cause,
7 so that you have a separate event for each person who
8 has COVID. This appears to be the import of the
9 language they want to put in.

10 It's nothing to do with symptomatic or asymptomatic
11 or diagnosed or undiagnosed; it's perfectly general. So
12 if you can show that there are outbreaks at two farms,
13 then you can say -- this appears to be an attempt to
14 say: there were occurrences at each of the farms and you
15 can't prove that either of them was causative, for
16 example, of a local lockdown. Let's say in due course
17 there is a local lockdown; it will be said, in reliance
18 on these words, no doubt, that you have to put all other
19 local outbreaks in the pot.

20 Now that, we submit, is not what my Lords decided at
21 all. All you've decided, and what the declaration
22 reflects, is the comparison you made between COVID
23 within the area and COVID without, and that's what the
24 declaration should be restricted to, and that's the sum
25 total of it.

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1 And there wasn't this argument that QBE now seek to
2 put forward through this draft declaration of carving-up
3 a COVID outbreak into its separate individuals who had
4 it.

5 LORD JUSTICE FLAUX: Right. Does Mr Edey want to say
6 something?

7 Submissions by MR EDEY QC

8 MR EDEY QC: My Lord only to support and endorse what the
9 FCA have said. We do object to the inclusion of the
10 words "within" and/or -- my Lords will recall that there
11 was in fact no argument whatsoever at any point directed
12 by any party to the question of whether one could
13 differentiate between cases within the relevant area.
14 The argument was solely ever about whether it mattered
15 whether they needed to be within or without and the
16 causal link between one versus the other. Nobody ever
17 said anything about differentiating between cases
18 within, and the risk is exactly as Mr Edelman says, that
19 what is being set up here is an attempt to make it
20 impossible, even in the case of a local lockdown --
21 which from recollection QBE accepted would be
22 potentially covered -- that insureds will battle away
23 because it will be said: ah, but which cases within the
24 area are the cause of the local lockdown?

25 So, my Lord, we do say that those words, which were

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1 never argued about, never discussed and don't appear in
 2 your judgment, should not form part of the declarations.
 3 LORD JUSTICE FLAUX: Thank you very much, Mr Edey.
 4 We'll retire to consider this and give our ruling on
 5 it now, and then we'll break for lunch.
 6 (1.02 pm)
 7 (Pause)
 8 (1.04 pm)
 9 LORD JUSTICE FLAUX: Right, Mr Justice Butcher will give our
 10 ruling on this one.
 11 Ruling
 12 MR JUSTICE BUTCHER: In relation to paragraph 12.2 we have
 13 considered the submissions which were made by the FCA,
 14 by HIGA and by QBE. We see the force of Mr Edey's and
 15 Mr Edelman's points that there was not any significant
 16 debate about other cases within the area.
 17 The declaration, as it stands, without the words
 18 added, allows for the possibility that there may be
 19 multiple occurrences of COVID-19 which have triggered
 20 the policy under the cover, and thus multiple cases can
 21 have constituted the relevant event, if that is the case
 22 factually, and we do not therefore think it is necessary
 23 to add, or appropriate to add, the words in blue in that
 24 declaration.
 25 MR EDELMAN QC: Thank you, my Lord, I'm grateful, and

1 I anticipate you now wanted to break for lunch?
 2 LORD JUSTICE FLAUX: Yes, I think so, Mr Edelman. Let's say
 3 2 o'clock and then we'll proceed with paragraph 13.
 4 MR EDELMAN QC: I'm grateful.
 5 LORD JUSTICE FLAUX: We don't have any danger of running
 6 over, do we?
 7 MR EDELMAN QC: All we've got now is, because everything
 8 else has fallen away, we've just got some points on
 9 Hiscox. Amlin and Zurich wording issues are all
 10 resolved. So there are some issues on that. We've just
 11 got that. Hopefully the certificates will be short, and
 12 then after that there may be some detailed argument
 13 about QIC, but I would have thought we should have time
 14 for that.
 15 MR EDEY QC: My Lord, just if it helps on certificates,
 16 I will be very short in light of the indication given
 17 earlier, so I don't think that will take up a great deal
 18 of time.
 19 LORD JUSTICE FLAUX: Let's break now for lunch and start
 20 again at 2 o'clock.
 21 (1.06 pm)
 22 (The short adjournment)
 23 (1.59 pm)
 24 LORD JUSTICE FLAUX: Right, when you are ready, Mr Edelman.
 25

1 Submissions by MR EDELMAN QC
 2 MR EDELMAN QC: I'm grateful, my Lord.
 3 Continuing with the declarations, if we could
 4 perhaps go to {N/11/10}, and you'll see that there was
 5 some suggested additional wording by Hiscox Action
 6 Group. As I understand it from Mr Lynch, they no longer
 7 pursue that alternative wording, so that 13 can stand as
 8 it is.
 9 Can I just mention now, before I forget, because
 10 otherwise I'm bound to, whether my Lords would be
 11 agreeable to the sealed order being published on the FCA
 12 website as soon as it's available?
 13 LORD JUSTICE FLAUX: Well, I don't see why not. I don't
 14 know if my Lord has any views.
 15 MR EDELMAN QC: I'm grateful.
 16 Can I then move on to the Hiscox declarations, and
 17 the issues and declarations start at {N/11/13} of the
 18 document we have on the screen. My Lord, there are
 19 a number of issues and I'm in my Lord's hands as to
 20 whether it's easier to take them compendiously or one by
 21 one.
 22 LORD JUSTICE FLAUX: It's probably better to take them
 23 compendiously, Mr Edelman.
 24 MR EDELMAN QC: That was my thought. Then we all have one
 25 go at speaking.

1 LORD JUSTICE FLAUX: Yes.
 2 MR EDELMAN QC: The first issue is — it applies to 17.2 and
 3 18.3. 17.2 you've got up on screen. It's the same
 4 point: it's whether you made a decision on interruption
 5 or whether your decision should be applied to Hiscox 2
 6 and 3 as well as 1 and 4. There was an issue for the
 7 court to decide on each of those policies, and that was
 8 squarely before the court.
 9 We say what the court did was to give an answer to
 10 the interruption issue by reference primarily to the
 11 Hiscox 1 lead wording, and that decision ought to be
 12 applied in the declarations to 2 and 3, as well as 4,
 13 which also merited an honourable mention in dispatches.
 14 If I can start with {N/1/76}, paragraph 243.
 15 LORD JUSTICE FLAUX: Yes.
 16 MR EDELMAN QC: That is where you began to deal with the
 17 policies, and you will see you are addressing here the
 18 Hiscox 1-4 policies, so you're addressing all of them,
 19 and your conclusion on the interruption issue is at
 20 {N/1/84}, paragraph 274.
 21 I think the origin of Hiscox's attempt to limit the
 22 declarations is at the foot of the page. Having
 23 expressed your general reasons you say:
 24 "As we set out below, it seems to us clear from
 25 a number of those clauses, at least in the Hiscox 1 lead

1 wording, that 'interruption' in this wording is intended
 2 to mean 'business interruption' generally ... "

3 LORD JUSTICE FLAUX: Mm.

4 MR EDELMAN QC: Then you return to the subject in relation
 5 to the Hiscox NDDA clause at {N/1/113}, paragraph 390.

6 LORD JUSTICE FLAUX: Yes.

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

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

22 LORD JUSTICE FLAUX: Yes.

23 MR EDELMAN QC: Effectively you rejected that submission.
 24 Now, the same clause as you are considering in 413
 25 also appeared in Hiscox 2 and 3. Perhaps I can show you

1 that, {B/7/25}, and it's item 3. This is in Hiscox 2,
 2 and it's "damage at the premises of one of your
 3 suppliers", and the same point about interruption
 4 applies in relation to that clause there. I accept, not
 5 as many clauses to indicate the same point as in Hiscox
 6 1, but there is at least this one which is in common,
 7 which of itself, we submit, is sufficient to demonstrate
 8 the -- to support the conclusion and make the conclusion
 9 you reached applicable to this policy as well, and the
 10 same is true of Hiscox 3, {B/8/29}.

11 LORD JUSTICE FLAUX: Yes.

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

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

20 Now, it's right, and I can't dispute this, that your
 21 judgment does not explicitly address 2 and 3, but our
 22 understanding is that the court was addressing this
 23 issue by reference to the lead policy in Hiscox. We
 24 don't accept that there was any slip or omission from
 25 the judgment, but if there was, if this was not

1 implicitly dealt with, even if not explicitly dealt
 2 with, then it was an obvious omission and the court can
 3 fill it and ought to by this declaration.

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

7 That's the first point on Hiscox.

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

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

15 "What this means for present purposes is that the
 16 only relevant matters which constituted 'restrictions
 17 imposed' are those which were promulgated by statutory
 18 instrument..."

19 And then you say:
 20 "... and in particular ..."

21 Now, it's right that you did not mention regulation
 22 6, but all you were doing is identifying the ones
 23 which -- we submit you were identifying the ones which
 24 you regarded as the most significant, and not explicitly
 25 excluding or relegating regulation 6. Therefore when

1 one goes on to 269, you addressed, and this was
 2 obviously relevant to regulation 6:

3 "We were not, however, persuaded by Hiscox's
 4 submission that the 'restrictions imposed' contemplated
 5 by the 'public authority' clause necessarily had to be
 6 directed to the insured, or to the insured's use of the
 7 premises..."

8 And then at 270 you say:
 9 "We did not consider that it could be said that
 10 Regulation 6 of the 26 March Regulations amounted to
 11 a 'restriction imposed' which could have led to
 12 an 'inability to use' the premises of all insureds where
 13 that insured's business had relied on the physical
 14 presence of customers."

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

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

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

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

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1 MR EDELMAN QC: This is "necessarily", the word
 2 "necessarily".
 3 Now, what you had said, because in this text it
 4 appears — says:
 5 "'Restrictions imposed' do not necessarily have to
 6 be directed to the insured ... and Regulation 6 is
 7 capable..."
 8 So those words go.
 9 But the word "necessarily", which we hadn't put in,
 10 is inserted by insurers and by Hiscox, and that has its
 11 origin — going back to {N/1/83}, it has its origin in
 12 paragraph 269, and the first sentence:
 13 "We were not, however, persuaded by Hiscox's
 14 submission that the 'restrictions imposed' contemplated
 15 by the 'public authority' clause necessarily had to be
 16 directed to the insured, or to the insured's use of the
 17 premises..."
 18 That's a different use of the word "necessarily".
 19 You're dealing with Mr Gaisman's submission that to be
 20 a restriction imposed it had to be directed to the
 21 insured —
 22 MR JUSTICE BUTCHER: I'm sorry, Mr Edelman, I have not
 23 understood that submission. In what sense is that
 24 a different use from the use proposed in the insurers'
 25 version of the declaration?

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1 MR EDELMAN QC: Because when you go to the declaration at
 2 {N/11/14}, what you were doing was rejecting
 3 a submission that it had to be, and you were saying it
 4 doesn't have to be. Mr Gaisman says it necessarily has
 5 to be, and you were saying: no, that's wrong. And he
 6 says: it doesn't necessarily have to be directed, which
 7 is a different thing altogether.
 8 MR JUSTICE BUTCHER: I'm sorry, I just do not understand
 9 that, Mr Edelman. Surely where it says in the proposed
 10 declaration "'restrictions imposed' do not necessarily
 11 have to be directed to the insured or the insured's use
 12 of the premises", isn't that exactly the same usage?
 13 MR EDELMAN QC: Well, in one you were rejecting an attempted
 14 exclusion, and we say that the word "necessarily" is
 15 otiose, and it could be read or misread as they may or
 16 may not be.
 17 LORD JUSTICE FLAUX: I don't understand this point either.
 18 If you read the first part of the sentence — the first
 19 sentence of 269, another way of saying the same thing
 20 would have been the sentence that begins:
 21 "'Restrictions imposed' do not necessarily have to
 22 be directed to the insured or the insured's use of
 23 premises..."
 24 It's exactly the same thing. It's just putting the
 25 words another way around. The same words are all there.

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1 I think you are tilting at a non-existent windmill here.
 2 MR EDELMAN QC: Well, I submit what's wrong with
 3 "restrictions imposed do not have to be directed to";
 4 what is wrong with that?
 5 LORD JUSTICE FLAUX: I think Mr Gaisman would say because
 6 that is not actually what we said in paragraph 269.
 7 MR EDELMAN QC: All I'm saying is what you said in 269 is
 8 simply because you were restricting a submission by
 9 Mr Gaisman.
 10 Anyway, I've said enough about it.
 11 LORD JUSTICE FLAUX: Right.
 12 MR EDELMAN QC: But all you were doing was rejecting his
 13 submission. That's why we say you used that word,
 14 because he was saying they necessarily have to be and
 15 you were saying: no, that's not right, he said that,
 16 that's not right, and it's sufficient simply to say —
 17 and if people are reading this, it should be in plain
 18 language — "'restrictions imposed' do not have to be
 19 directed to the insured". That's it. That's what you
 20 decided. The word "necessarily" doesn't add anything
 21 and could cause confusion.
 22 The next point on the Hiscox — I should say also
 23 that — I'm on 17.4. I think I've missed out the fact
 24 that — but Hiscox Action Group can deal with this —
 25 I think they had some alternative wording for 17.3, but

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1 perhaps they can argue that when they get to it.
 2 Just to point out, I think the word in red at the
 3 top is just a correction of a typographical error.
 4 Mr Gaisman can perhaps confirm that.
 5 LORD JUSTICE FLAUX: "Inability to use", yes.
 6 MR EDELMAN QC: Then going on to a third point, we agree
 7 with — on reflection we agree. We accept we didn't
 8 initially disagree with it, the paragraph, but we agree
 9 with HAG that — and we invite the court to consider
 10 whether it's appropriate to have the last sentence in
 11 black on page 14, "Whether such restriction". That one
 12 is a question of fact. The last sentence:
 13 "Cases in which Regulation 6 would have caused an
 14 'inability to use' the insured's premises would be
 15 rare".
 16 LORD JUSTICE FLAUX: Well, that, again, reflects fairly
 17 loyally what we said in the last two sentences of 270.
 18 MR EDELMAN QC: It does, but that will be there for all to
 19 see. The question is whether it's a suitable matter for
 20 a declaration because it's not a finding; it is in
 21 reality just a prediction of how often the court
 22 expects, on the information it currently has, regulation
 23 6 to result in a favourable finding for policyholders.
 24 We submit that —
 25 LORD JUSTICE FLAUX: If part of the function of all this is

1 to act, as it were, as a template for either encouraging
 2 or discouraging the pursuit of claims, or encouraging or
 3 discouraging insurers from contesting claims or paying
 4 them, then why isn't including in the declarations what
 5 we said in the last two sentences of paragraph 270 of
 6 assistance?
 7 MR EDELMAN QC: Well, my Lord, it's a matter of judgment for
 8 the court whether it's right or not to include in
 9 declarations matters which are in reality no more than
 10 the court's expectation based on the information it
 11 currently has —
 12 LORD JUSTICE FLAUX: Right.
 13 MR EDELMAN QC: — rather than determinations of
 14 construction or law.
 15 LORD JUSTICE FLAUX: Okay.
 16 MR EDELMAN QC: I say no more about it.
 17 LORD JUSTICE FLAUX: Right.
 18 MR EDELMAN QC: Then the final point on this paragraph, and
 19 this is perhaps the most important of the points on this
 20 paragraph, is on page 15 where Hiscox attempt to insert
 21 a categorical declaration that businesses in categories
 22 3 and 5 did not suffer an inability to use due to
 23 restrictions imposed within the meaning of Hiscox 1–4.
 24 So it's going even further than what the court said,
 25 that it would be rare to say that it could never happen.

1 LORD JUSTICE FLAUX: Where do we deal with this in our
 2 judgment?
 3 MR EDELMAN QC: That's really the point.
 4 What I think Mr Gaisman is trying to take advantage
 5 of is what the court said in relation to prevention of
 6 access clauses. If we go to, for example, paragraph 335
 7 of the judgment, and that's at {N/1/99}. Perhaps
 8 I ought to start with 333, because that's category 3,
 9 and you're here dealing with prevention of access, and
 10 just over halfway down the paragraph, when you're
 11 dealing with Ms Mulcahy's examples, you say:
 12 "That may amount to an impediment or hindrance in
 13 the use of the premises, but it is not in any sense
 14 a prevention of access..."
 15 And category 5, at the foot of the page, about four
 16 lines up you say:
 17 "The offices were not required to close and at most
 18 there was an impediment or hindrance on the use of the
 19 premises..."
 20 But what we understand Hiscox is seeking to do is
 21 take your conclusions about prevention of access in
 22 relation to categories 3 and 5 and apply them also to
 23 inability to use, but we say that's inappropriate where
 24 the court was drawing a distinction between the concept
 25 of access and the concept of use.

1 The same point can be made in relation to the Hiscox
 2 NDDA clause. That's {N/1/114}, paragraph 391. That was
 3 also an access clause as you can see — you may
 4 remember, but you can see in the middle of the page, and
 5 what you said about that was at 415, {N/1/120}. You
 6 accept that for categories 3 and 5 it cannot be said
 7 that there was a denial or hindrance of access to such
 8 premises:
 9 "We also agree with him that Regulation 6 imposing
 10 restriction on movement other than for permitted
 11 purposes did not impose any denial or hindrance in
 12 access to insured premises, as opposed to use of such
 13 premises."
 14 So what the court was clearly saying, we submit, for
 15 categories 3 and 5, is that regulation 6 doesn't help on
 16 prevention or denial of access, but it may or may not be
 17 relevant to the use.
 18 Now, we're not asking the court to make any
 19 conclusion about the extent to which regulation 6 may
 20 help businesses. You've already said in your judgment
 21 that you anticipate it to be rare. But what we oppose
 22 is any attempt in a declaration to preclude such
 23 categories of business from asserting an inability to
 24 use.
 25 Now, of course we accept — going back to {N/1/83},

1 we accept and could not challenge, save on appeal, the
2 hurdle that you have erected for policyholders to
3 overcome in relation to inability to use. You have
4 said, essentially, that only a partial use which was
5 sufficiently nugatory or vestigial would not prevent
6 there being a total inability to use; otherwise partial
7 use would.

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

16 Similarly, taking a category 3 example, there may be
17 a multi-storey department store which has a small
18 pharmacy area by the entrance, and the entirety of the
19 department store cannot be used but the small corner of
20 one floor, which is open as a pharmacy, can be used.

21 Now, there would be a debate about whether that is
22 sufficient -- that's nugatory or vestigial, but it
23 should be at least open to a category 3 business to say
24 that it was, and that is why we object to the attempt by
25 Hiscox to preclude any such business from presenting

1 an argument. Going back to {N/11/15}, that is precisely
2 what Hiscox is attempting to do.

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

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

8 MR EDELMAN QC: Yes, exactly.

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

18 MR EDELMAN QC: Exactly.

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

20 MR EDELMAN QC: Yes, absolutely. We're under no illusion
21 about that and that's what the court found and the
22 barrier, the hurdle that you presented for
23 policyholders. But this declaration goes too far, and
24 it is important.

25 Now, moving on, there is I think in 17.6 {N/11/15}

1 you'll see again there's some wording suggested.

2 I think I already drew your attention to some on 17.4.

3 There's some alternative wording suggested by the Hiscox
4 Action Group. I'll again let them develop it.

5 Going to the next page of this document {N/11/16},
6 18.3 I have already addressed.

7 LORD JUSTICE FLAUX: You've addressed.

8 MR EDELMAN QC: And, finally, 19 {N/11/17}, on the next
9 page. As I understand it, Mr Lynch does not pursue this
10 alternative wording. We've got just one small concern
11 about this, the words "an insured is able to
12 demonstrate". Those words should, we submit, be deleted
13 if the Hiscox wording is adopted. The application of
14 policy terms should be expressed neutrally in
15 a declaration. They either do or do not permit
16 recovery. Insofar as there is a question of fact
17 involved, the declarations don't need to address the
18 burden of proof. That's all I say about that.

19 But otherwise, we don't have any particular
20 objection to that addition.

21 LORD JUSTICE FLAUX: Right.

22 MR EDELMAN QC: I'm just seeing -- from the nature of this
23 case I do have, I am afraid, emails in front of me
24 related to this case because people can't pass me
25 stickers. I think there's been an agreement on a form

1 of wording for 11.2(a), and that should have been sent
2 to your clerk.

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

6 What I suggest, Mr Edelman, is if you have a few
7 minutes to consider that. Or one possibility would be
8 that we deal with everything else, including Mr Hofmeyr,
9 and come back to this at the end of the day.

10 MR EDELMAN QC: Yes.

11 LORD JUSTICE FLAUX: By which time everybody will have had a
12 chance to further reflect. I mean, I can understand why
13 insurers object to the words in red, but we will hear
14 what everybody has to say.

15 MR EDELMAN QC: Yes.

16 LORD JUSTICE FLAUX: So it will be a new 11.3. So existing
17 11.3 would presumably become 11.4?

18 MR EDELMAN QC: Yes.

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

21 MR EDELMAN QC: Yes, absolutely.

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

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

25 MR EDELMAN QC: Yes.

1 Submissions by MR LYNCH QC
 2 MR LYNCH QC: My Lord, thank you.
 3 My Lords, the Hiscox interveners adopt Mr Edelman's
 4 submissions and I'll try my best to be brief and just to
 5 make additional points rather than repeat anything.
 6 So if we please go to {N/11/13}, and this was the
 7 point, your Lordships will remember, about whether or
 8 not Hiscox 2 and 3 are also addressed as well as 1 and
 9 4.
 10 Just to add one point to Mr Edelman's submissions,
 11 just to put the point the other way, there's nothing in
 12 the judgment that says anything different about Hiscox 2
 13 and 3, and it would were there a different decision. So
 14 that's ...
 15 LORD JUSTICE FLAUX: It is unfortunate, given that you had
 16 a week in which to give us any corrections to the
 17 judgment or any omissions, and you did -- I'm not
 18 directing this at you, but people generally -- that you
 19 reminded us that we'd failed to deal with one particular
 20 RSA 4 clause, but nobody said to us: you haven't dealt
 21 with interruption in relation to Hiscox 2 and 3. If you
 22 had, no doubt we would have considered the point and
 23 I suspect we would have decided that what we had said
 24 applied to all the Hiscox policies, 1, 2, 3 and 4 --
 25 MR LYNCH QC: My Lord, well --

1 LORD JUSTICE FLAUX: -- because of the existence of the
 2 suppliers clause, which can't make sense unless
 3 interruption means more than complete cessation.
 4 Anyway, that's a separate point.
 5 MR LYNCH QC: My Lord, thank you. For my own part, I am
 6 afraid I regarded it as so clear that the judgment
 7 covered all four that it was not a point that needed
 8 pointing out. But it's a point that's been taken, and
 9 I am afraid that's why certainly we didn't raise it.
 10 If we then move on to the next page, please
 11 {N/11/14}, and the wording at the top there, there's no
 12 difference in principle at all between the Hiscox
 13 interveners and the FCA on this. It's simply that this
 14 is a different proposed wording which we think more
 15 faithfully follows the wording of the judgment. But
 16 that's simply a matter for your Lordships, and if
 17 your Lordships prefer the writing in the black font,
 18 then that's a matter for your Lordships. We thought
 19 that this followed it more directly. But there's no
 20 point of principle at all there.
 21 Then looking, please, at the next paragraph,
 22 17.4(a). Just very briefly on this, it seems to us that
 23 your Lordship's judgment at paragraph 270 can only mean
 24 that regulation 6 is capable of being a restriction
 25 imposed, otherwise your Lordships would have introduced

1 paragraph 270 with, "If we're wrong that regulation 6 is
 2 not capable of being a restriction imposed, then we
 3 would go on to find..." or simply would have left out
 4 paragraph 270 altogether.
 5 As to the point as to matters being -- or various
 6 types of claim being -- inability to use premises would
 7 be rare, I just simply adopt Mr Edelman's submissions.
 8 Although your Lordships will have seen some examples
 9 in our skeleton argument of cases where on the facts we
 10 say that there was an inability to use caused by
 11 regulation 6, those are untested, they were not before
 12 your Lordships, and I don't press them any further on
 13 that point.
 14 So, just going on to the next page, please
 15 {N/11/15}, at 17.4(b), this is the most important of all
 16 of these points, as far as the Hiscox interveners are
 17 concerned, and again we adopt Mr Edelman's submissions.
 18 The first point to make is really what we see as the
 19 short answer to this point: simply your Lordship's
 20 judgment at paragraphs 268 and 270 saying in terms
 21 whether there were such cases would be a question of
 22 fact, and that seems to be a complete answer to the
 23 point.
 24 But in any event, there are examples, which I've
 25 referred your Lordships to. If we could just briefly

1 turn up, please, {P/11/7}, and from that page and then
 2 on to the next page and then, indeed, the following
 3 page, are some examples, which I repeat are untested
 4 {P/11/8-9}, but they are, on the Hiscox interveners'
 5 case, the examples where it will be argued on the facts
 6 that category 3 and category 5 businesses did suffer
 7 an inability to use their premises due to restrictions
 8 imposed within the meaning of the policies. That seems
 9 completely consistent to us with your Lordships'
 10 judgment, which is that it's a matter of fact.
 11 If we take just one of the examples, please, we see
 12 factual example 3 {P/11/8}:
 13 "The insured provides classroom training to law
 14 enforcement and private sector customers. It is ...
 15 Category 5 ... The insured conducts its business from a
 16 training classroom and conferencing facility.
 17 Regulation 6 has impacted the business as 'clients could
 18 not lawfully attend on-site training' and employees had
 19 to work from home and therefore could not conduct
 20 on-site training. This caused a downturn in turnover."
 21 Now, whether that's right or wrong obviously isn't
 22 to be determined now, but certainly putting the case on
 23 the facts would be consistent with your Lordships'
 24 judgment, paragraphs -- well, it really starts at 266
 25 through to 270, but in particular under 268 and 270.

1 That's an example.
 2 The problem with the declaration stating in terms
 3 that insureds carrying on business in categories 3 and 5
 4 did not suffer an inability to use their premises due to
 5 restrictions imposed is, one, it is contrary to
 6 your Lordships' judgment but, two, it is obviously far
 7 too categorical and it will simply depend on the facts.

8 If we then please go to {N/11/10} — oh, sorry,
 9 excuse me. {N/11/15}. Thank you.

10 Here, again, there's no issue of principle raised by
 11 the Hiscox interveners at all. It's simply that what
 12 we've done is essentially cut and pasted across from
 13 paragraph 273 of the judgment in a way that we think
 14 more accurately reflects the judgment. So the first
 15 sentence of our proposed wording is effectively the same
 16 as the third sentence of paragraph 273, and the second
 17 sentence of our proposed wording is effectively the same
 18 as the last sentence of paragraph 273, and it's simply
 19 a matter for your Lordships which wording is preferable,
 20 but there's no point of principle at all.

21 Then if we please go on to, in the same document,
 22 two pages on to {N/11/17}. My learned friend Mr Edelman
 23 rightly has clarified that this is no longer pursued, so
 24 we have no submissions to make on that point.

25 So that covers all of our points, unless there are

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1 any specific points that I could assist with on those
 2 matters?
 3 LORD JUSTICE FLAUX: So paragraph 19, the insurers' draft is
 4 accepted?
 5 MR LYNCH QC: Yes, excuse me, subject to Mr Edelman's
 6 clarification.
 7 MR JUSTICE BUTCHER: His point about "an insured is able to
 8 demonstrate"?
 9 MR LYNCH QC: Yes, exactly. We adopt that. Thank you.
 10 LORD JUSTICE FLAUX: I'm sorry, I'm now completely lost. Is
 11 19 — what is it about insurers' paragraph 19 that is
 12 still in issue, if anything?
 13 MR LYNCH QC: It was the point on the first line that
 14 Mr Edelman clarified as to "an insured is able to
 15 demonstrate".
 16 LORD JUSTICE FLAUX: Yes.
 17 MR LYNCH QC: We just adopt that point, but we take no other
 18 point.
 19 LORD JUSTICE FLAUX: Right.
 20 MR LYNCH QC: My Lord, thank you.
 21 LORD JUSTICE FLAUX: Thank you, Mr Lynch.
 22 Mr Gaisman?
 23 Submissions by MR GAISMAN QC
 24 MR GAISMAN QC: Yes, can I deal first with the interruption
 25 point, Hiscox 2 and 3.

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1 There is no assumption, and there shouldn't be
 2 an assumption, that your Lordships either decided or
 3 should have decided every point that was technically in
 4 issue, and your Lordships did not decide, and I'll show
 5 your Lordships for good reason what the position was in
 6 relation to Hiscox 2 and 3.

7 My learned friends can't agree about this. Mr Lynch
 8 says it's so obvious that your Lordships had decided it
 9 that he didn't raise it in the week after the judgment.

10 Somewhat more realistically, Mr Edelman implicitly
 11 recognises that your Lordships did not decide it because
 12 his submission was that the question is whether or not
 13 your ruling on 1–4 ought to be applied to 2–3. There is
 14 no doubt your Lordships were shown by Mr Edelman most of
 15 the relevant bits, but your Lordships carefully said and
 16 deliberately said that you reached the conclusion about
 17 the meaning of the word "interruption" in relation to or
 18 at least in relation to Hiscox 1 and 4.

19 Now, your Lordships will have appreciated that there
 20 are two integers between 1 and 4 and your Lordships did
 21 not omit to remember the existence of Hiscox 2 and 3
 22 and, as I shall show your Lordships, this was
 23 deliberate.

24 At the outset I should correct both of my learned
 25 friends' skeletons which imply, or state, I'm not quite

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1 sure which, that issues around Hiscox 2 and 3 were
 2 debated or argued at length. They were not.

3 All that happened was that most, if not all, of the
 4 debate on this focused around Hiscox 1, which was much
 5 the fullest wording, and I simply pointed out, and we
 6 didn't have much time available, that you should be
 7 aware of the fact that Hiscox 2 and 3 in particular had
 8 a much smaller number of insuring clauses following on
 9 from the stem.

10 We simply didn't have time to debate. As I shall
 11 tell your Lordship, there were 23 Hiscox 2 wordings and
 12 they're all different. We simply didn't have time to
 13 debate all these points. That wasn't the nature of the
 14 hearing. There were, I think, 39 Hiscox wordings — 41
 15 Hiscox wordings in total. We had to streamline. At no
 16 stage were your Lordships attempting, nor could you have
 17 attempted, to decide all the points of construction on
 18 all the wordings, not even all the lead wordings.

19 Now — so there is no question of a decision by
 20 necessary implication.

21 Now, why do I say that your Lordships deliberately
 22 reached the limited conclusions? The argument — we
 23 just need to remember how the argument went on this.

24 In paragraph 274 — can we look at {N/1/84}.
 25 I don't know whether your Lordships have a hard copy

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1 judgment, but in case you don't, {N/1/84}.

2 LORD JUSTICE FLAUX: Paragraph 274.

3 MR GAISMAN QC: 274. The starting point was that my

4 argument was recognised — my argument around the word

5 "interruption", which was after all what we were arguing

6 about, was recognised in principle to have a great deal

7 of force, or much force, because interruption in the

8 stem, in principle, had it stood alone, would mean

9 interruption, not interference. If that had been the

10 only provision, we would have won.

11 But it wasn't, and if you look at paragraph 274 you

12 will see that there is a reference to the fact that in

13 the — at least in the Hiscox 1 wording, there were, if

14 I can find what I'm looking for, a number — it's about

15 four lines up from the bottom of the page. Second line

16 up from the bottom of the page:

17 "As we set out below, it seems to us clear from

18 a number of those [that means the insuring] clauses, at

19 least in the Hiscox 1 lead wording, that 'interruption'

20 ... is intended to mean..."

21 If we go over the page {N/1/85}:

22 "... 'business interruption' generally, including

23 disruption or interference ..."

24 So this number of insuring clauses was

25 a countervailing force against my prima facie forceful

1 argument.

2 So that was the context, and exactly the same point

3 was made in paragraph 409 of the judgment. I am afraid

4 I haven't got the page for that, I've overlooked that.

5 Is there any way that we can look at page 409 —

6 LORD JUSTICE FLAUX: It's the same point, isn't it?

7 MR GAISMAN QC: All right. Thank you.

8 LORD JUSTICE FLAUX: Yes.

9 MR GAISMAN QC: So, in other words, what your Lordships were

10 faced with as a matter of construction were two types of

11 clause pulling in opposite directions: one was the stem

12 itself, and the other was, in the case of — the other

13 was other insuring clauses.

14 Now, it's obviously the point that the greater the

15 number of countervailing insuring clauses, the greater

16 the argument against my prima facie powerful submission

17 on the meaning of the word "interruption", and that's

18 a process of construction which had to be weighed

19 contract by contract.

20 Now, in only deciding Hiscox 1 and 4 your Lordships

21 were recognising two very simple points: first, you

22 couldn't construe Hiscox 2 and 3 by reference to Hiscox

23 1 and 4, that's obvious; and, secondly, that the

24 context, these other insuring clauses in Hiscox 2 and 3

25 were different from, as indeed they were very different

1 from, 1 and 4. Your Lordships I think were told,

2 because it was in our skeleton, that there were far

3 fewer insuring clauses following the stem in Hiscox 2

4 and 3.

5 Now, drilling down just a little into the details,

6 if we look at {N/1/118}, my learned friend Mr Edelman

7 has fastened on the one clause which the various — the

8 supplier wording which is present in the Hiscox — in

9 all the Hiscox 2 wordings.

10 But if you consider from paragraph 410 onwards, the

11 first matter your Lordships — and I was questioned by

12 Mr Justice Butcher about this — taxed me with was the

13 loss of attraction clause, and I made a submission,

14 which your Lordships didn't accept, that it was in the

15 wrong place, and what was put to me — and perhaps,

16 unsurprisingly, given the questions, ended up in the

17 judgment in paragraph 410 — was the loss of attraction

18 clause. Then there was a point about specified

19 suppliers, where I had great trouble with my Lord,

20 Lord Justice Flaux, and unspecified customers too.

21 However, these clauses are absent from virtually all

22 of the Hiscox 2 and 3 wordings. The only one that

23 isn't, as I said, is one about suppliers.

24 So none of them — none of these words, none of

25 these types of cover appear in any Hiscox 3 wording.

1 "Loss of attraction" does not appear in 18 out of the 23

2 Hiscox 2 wording and wasn't in the Hiscox 2 lead wording

3 that your Lordships may have looked at.

4 The loss of attraction point is the first point

5 against my prima facie forceful submission that is

6 mentioned in your Lordship's judgment, being the first

7 one I was taxed with by my Lord, Mr Justice Butcher.

8 So what, in fact, you have in Hiscox 1–3 is only one

9 clause, the one Mr Edelman of course has focused on,

10 pulling in the opposite direction, and not all of these

11 clauses.

12 So the situation is that the strength of the

13 countervailing argument in relation to Hiscox 2 and 3 is

14 much weaker. I'm not saying it's not there. Who knows,

15 it might prevail. I'm not ready to argue it, to be

16 honest. But it was a much weaker argument.

17 So unsurprisingly, in those circumstances, the court

18 said we will decide Hiscox 1 and 4, and it would be

19 quite wrong now, as it were, if judges have hooves,

20 I don't know, but it would be quite wrong for the court

21 on the hoof to decide: well, it would be neat to

22 paper — to fill this gap.

23 We didn't get there and it was in the nature of the

24 hearing — and no one can complain about this, and

25 I don't complain about it and no one else can — that

1 not every "i" could be dotted and every "t" crossed. It
 2 wasn't possible. This wasn't a mistake. It wasn't
 3 a gap. It wasn't decided and your Lordships, with the
 4 greatest of respect, should resist the temptation of
 5 elegance and not decide it now because you haven't heard
 6 full argument on it.
 7 I'm sorry if that's, in principle, a slightly
 8 unsatisfactory conclusion, but it's not an accident and
 9 it wouldn't be fair.

10 LORD JUSTICE FLAUX: So what would then happen to this
 11 point?
 12 MR GAISMAN QC: This point, my Lords, will have to be
 13 debated hereafter in whatever forum it is debated. If
 14 interruption goes on appeal, then this point will get
 15 wrapped up in that. If it doesn't, it will have to be
 16 debated, for example, in the arbitration that the Hiscox
 17 Action Group has brought.
 18 But your Lordships haven't decided every question.
 19 Of course you haven't. We've just been listening to
 20 submissions to the effect that such and such is
 21 a question of fact. Nor have your Lordships decided
 22 every question of law, as we've also seen this morning
 23 in relation to the operation of the trends clauses.
 24 Your Lordships simply didn't decide this, and it's
 25 not right that your Lordship should assume without

1 proper argument — because your Lordship hasn't heard
 2 proper argument, your Lordship still hasn't had a proper
 3 look at these 23 Hiscox 2 wordings — that we're wrong
 4 about this. It's just a point your Lordships didn't
 5 decide and there's no criticism either of your Lordships
 6 for not deciding it or of anybody else for not having
 7 pointed it out. In good conscience, your Lordships had
 8 enough on your plates.
 9 So that's what I say about that, my Lords, unless
 10 your Lordships want anything more on interruption.
 11 LORD JUSTICE FLAUX: No, thank you.
 12 MR GAISMAN QC: I want to move on, because it's logical to
 13 do it in this way, to categories 3 and 5.
 14 Now, this is a much more formidable and serious
 15 argument than it has been given credit for and perhaps
 16 we didn't do it full justice in our skeleton.
 17 Your Lordships would have seen the strength of the
 18 argument if my learned friend Mr Edelman had read the
 19 second half of paragraph 415 and not just the first.
 20 But there we are, we're all under pressure of time.
 21 Now, I make no apology for reading this judgment as
 22 a whole. Hiscox's proposed declaration on this point is
 23 supported by what your Lordships said in relation to the
 24 access clauses. It is quite legitimate, as long as we
 25 do so fairly and accurately, to rely on one in the

1 context of the other. Unlike other submissions, I am
 2 proceeding on the basis that this judgment is logically
 3 coherent.
 4 Now, the shape of the argument is this, my Lords,
 5 and there are four basic propositions. We'll look at
 6 the judgment when I've indicated what the propositions
 7 are.
 8 First, in relation to the prevention of access
 9 clauses, the court clearly held — I'll just give you
 10 the reference — at paragraphs 333 and 433 that there
 11 was no prevention of access as regards categories 3 and
 12 5 businesses because they weren't subject to compulsory
 13 closure under regulations 4 and 5. In the same
 14 paragraphs the court rejected the FCA's submission that
 15 regulation 6 meant that there was a prevention of access
 16 in relation to category 3 and 5 businesses. That's the
 17 first point.
 18 The second point is this: as we will see, in the
 19 same paragraphs the court contrasted "accessing
 20 premises" with "using premises" and it held that, at
 21 most, your Lordship's words, regulation 6 may have
 22 created an impediment or hindrance in use for category 3
 23 and category 5 businesses, as opposed to an inability to
 24 access them: at most a hindrance or impediment in use.
 25 Thirdly, and importantly, the court also held for

1 the purpose of the Hiscox public authority clause that
 2 inability to use requires something — and I quote —
 3 "significantly different from hindering in use or
 4 similar". That's paragraph 268.
 5 So mere impediment or hindrance in use of the
 6 premises is therefore insufficient for a category 3 or
 7 category 5 insured to be covered under the public
 8 authority clause.
 9 LORD JUSTICE FLAUX: Can you just give me that reference
 10 again? 268 is it?
 11 MR GAISMAN QC: Yes, {N/1/83} for those who prefer to read
 12 it in electrons.
 13 LORD JUSTICE FLAUX: I've got it in hard copy, Mr Gaisman,
 14 as you can imagine. Bedtime reading every night.
 15 MR GAISMAN QC: Yes. Second line:
 16 "'Unable to use' means something significantly
 17 different from 'hindered in using' or similar."
 18 By "similar" no doubt your Lordships had in mind
 19 hindrance or impediment, which was the language that
 20 your Lordships used elsewhere.
 21 LORD JUSTICE FLAUX: Yes.
 22 MR GAISMAN QC: So that's the third stage of the argument.
 23 And the fourth stage is this: yet further the court
 24 also held, as we will see, that even if categories 3 and
 25 5 businesses' use of premises was affected by regulation

1 6, that was not, contrary to the requirements of the
 2 Hiscox PA clause, an inability to use premises due to
 3 restrictions imposed, ie due to mandatory government
 4 action. So that was a separate point. That critical
 5 point was in the second half of paragraph 415 after my
 6 friend had stopped reading from that paragraph.
 7 LORD JUSTICE FLAUX: Can we have a look?
 8 MR GAISMAN QC: Let's look at it now by all means.
 9 Paragraph 415, {N/1/120}. I want to come back to this,
 10 but since I've been asked to identify it.
 11 The point is --- can we pick it up four lines from
 12 the bottom. This is categories 3 and 5, this paragraph,
 13 and what it says is:
 14 "At most..."
 15 As I said, those are your Lordship's words:
 16 "... there was a restriction on use of the offices
 17 because they could work from home, but since the
 18 Regulations were silent about businesses in Category
 19 5..."
 20 And I might add a fortiori in relation to category 3
 21 which were expressly allowed to stay open:
 22 "... it cannot be said that any such restriction on
 23 use was imposed by or by order of the government."
 24 Or, I would add, a public authority, which so...
 25 So that's the shape of the argument, my Lord, and

1 there's no escape from this. That's what your Lordships
 2 decided.
 3 Now, let's start --- let's break it down a bit.
 4 Category 3 first.
 5 That category 3 businesses did not suffer
 6 an inability to use their premises due to restrictions
 7 imposed is the irrefutable consequence of your Lordships
 8 accepting our submission that "restrictions imposed"
 9 meant something mandatory. Your Lordship won't have
 10 forgotten that bit of your Lordships' judgment,
 11 paragraph 266. We needn't look at it. So in relation
 12 to categories 3 and 5 that was the 26 March regulations
 13 or nothing.
 14 Now, as your Lordships will definitely remember,
 15 category 3 businesses were expressly permitted to stay
 16 open by those regulations, and it necessarily follows
 17 that it was a reasonable excuse under regulation 6 to
 18 leave home in order to go to them, or indeed to work for
 19 them, or indeed to obtain goods or services from them.
 20 Thus, no category 3 business could ever say that
 21 there was an inability to use its premises as a result
 22 of a restriction imposed, given the court's ruling at
 23 paragraph 266.
 24 My learned friend Mr Edelman talked about
 25 a department store with a tiny little pharmacy outlet

1 and said that was a category 3 business. Well, that
 2 business wouldn't be a category 3 business, taking the
 3 business as a whole. It's an example that, so to speak,
 4 isn't a fair one.
 5 LORD JUSTICE FLAUX: It's your favourite example, isn't it,
 6 Mr Gaisman, of Waitrose in Salisbury?
 7 MR GAISMAN QC: Well, I haven't been there since I last
 8 appeared before your Lordship. I've transferred my
 9 loyalties to Ringwood.
 10 LORD JUSTICE FLAUX: That's the point though, isn't it? It
 11 remained open throughout and it could not be said ---
 12 well, it's quite difficult to say there was an inability
 13 to use merely because you had to queue in the rain, but
 14 even if it could, it couldn't be said it was as a result
 15 of restrictions imposed by the ---
 16 MR GAISMAN QC: But your Lordships have already held it's
 17 not an inability to use. At most, it's a hindrance and
 18 impediment.
 19 LORD JUSTICE FLAUX: Quite.
 20 MR GAISMAN QC: That's the earlier stage of the argument.
 21 Now, I've put the arguments before your Lordship.
 22 We just need to pick up the relevant paragraphs of the
 23 judgment.
 24 LORD JUSTICE FLAUX: Yes.
 25 MR GAISMAN QC: My learned friend Mr Edelman took you to

1 some of these. 333 is the first, which is at {N/1/99}.
 2 We start with category 3 and your Lordships recall, if
 3 you are with me:
 4 "As the FCA accepts, they were permitted to carry on
 5 business by Regulation 5. Since none of them had to
 6 close ... there is simply no qualifying prevention of
 7 access."
 8 Then we get on to reduced footfall, and you say:
 9 "That may amount to an impediment or hindrance in
 10 the use of the premises..."
 11 But your Lordships have held in 268 that
 12 an impediment in use of the premises is not the same as
 13 an inability to use. For an inability to use, something
 14 more, indeed much more, needs to be --- is required. So
 15 I think that's probably the relevant --- sorry, I should
 16 read the end of that.
 17 Yes, I could just, perhaps --- the last sentence:
 18 "Where the policyholder chose to close down the
 19 business because of reduced footfall or for some other
 20 reason, that is not a qualifying prevention of access,
 21 because the closure was not due to government actions or
 22 advice, since the relevant actions or advice permitted
 23 the premises to remain open."
 24 And that is in a way similar to the point at the end
 25 of 415.

1 Then we get on to 433, please, on {N/1/125}. This
 2 is in the context of MSA, prevention of access clause,
 3 and again your Lordships are dealing with categories 3
 4 and 5. First you say no question of prevention of
 5 access. Then there's this sentence:
 6 "It is no answer for the FCA to rely upon the
 7 restrictions on movement imposed by Regulation 6 ... to
 8 argue that customers' ability to visit many premises was
 9 severely limited. At most, in the case of businesses
 10 which remained open or were not required to close, that
 11 was a hindrance in use, not a prevention of access."
 12 When you tie up that finding or holding with what
 13 I've shown your Lordship in paragraph 268, which is that
 14 an inability to use, which is the word in our clause,
 15 requires something, your Lordship said, something
 16 significantly different from a hindrance of use,
 17 paragraph 268, all these paragraphs fit together.
 18 Your Lordships will have meant, I continue to assume, to
 19 express yourselves consistently through the judgment.
 20 Then we get to category 5 businesses, which were not
 21 required to close. What your Lordships did there, you
 22 described the impact of regulation 6 on those businesses
 23 in terms that again fall short of anything like
 24 an inability to use. That's the first point.
 25 And the second point — and this is at the end of

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1 415 — you said that even if the use of category 5
 2 premises was restricted, that was not the consequence of
 3 a restriction imposed. The language in our clause, our
 4 PA clause, was "inability to use due to restrictions
 5 imposed".
 6 There are three paragraphs I need to look at, but
 7 the first I already have and I won't go back to. That's
 8 paragraph 433.
 9 Then we need to look at paragraph 335, which you
 10 find at {N/1/99}. We're now on category 5, and category
 11 5 consists of businesses, as your Lordships say there,
 12 which were permitted to stay open. And then there's
 13 a discussion about regulation 6, and you say, about five
 14 lines down:
 15 "It is nothing to the point that clients or
 16 customers did not visit the offices of their accountant,
 17 lawyer or financial adviser because of the restrictions
 18 on movement imposed by Regulation 6... The offices were
 19 not required to close and at most there was
 20 an impediment or hindrance on the use of the premises,
 21 nothing which amounted to a prevention of access."
 22 Do I go on?
 23 Then there's the example of the solicitors. I'm not
 24 sure — well, would your Lordship just cast an eye over
 25 the rest of that paragraph.

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1 Now, we then come, critically, to paragraph 415.
 2 I know your Lordship has looked at that. My learned
 3 friend, as I might have done if I were him, stopped
 4 after about seven lines because what he stops at is he
 5 read the sentence "We also agree" about five lines down.
 6 Sorry, I should have said, this is {N/1/120} for those
 7 who are... so line 5:
 8 "We also agree with him that Regulation 6 imposing
 9 restrictions on movement other than for permitted
 10 purposes did not impose any denial of or hindrance in
 11 access to insured premises, as opposed to use..."
 12 And my learned friend stopped there. You can't stop
 13 there. You need to read on.
 14 Then there's discussion of people who could work at
 15 home visiting their offices, and then, four lines up
 16 from the bottom:
 17 "At most there was a restriction on use of the
 18 offices ..."
 19 That's the same, I take it, as a hindrance or
 20 an impediment:
 21 "... on use of the offices because they could work
 22 from home..."
 23 That's the first point. But then the second point:
 24 "... but since the Regulations were silent about
 25 businesses in Category 5 [as indeed they were], it

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1 cannot be said that any such restriction on use was
 2 imposed by or by order of the government."
 3 So that's a quite separate point. How can
 4 restrictions be imposed on category 5 businesses by law
 5 when there is nothing in the law that mentions category
 6 5 businesses? That was the point we made, and that was
 7 a point that we made that your Lordships accepted.
 8 So that is why, if we can now go back to the
 9 declaration that we seek in relation to this, which is
 10 in 17.4(b). I think it's {N/11/15}. I've been working
 11 on N/10, I am afraid, because... well, never mind why.
 12 That is why we have expressed a declaration the way
 13 we have:
 14 "Insureds carrying on businesses in Category 3 and
 15 Category 5 did not suffer an 'inability to use' their
 16 premises due to 'restrictions imposed' within the
 17 meaning of Hiscox 1–4."
 18 That is exactly, I respectfully submit, what
 19 your Lordships decided in paragraph 415 of the judgment.
 20 The truth is that when we go back to the paragraphs
 21 my learned friends rely on at 267–270, one's got to
 22 construe this judgment as a whole, and the trouble is
 23 that there were lots of points on this Hiscox public
 24 authority clause which were closely related, and there
 25 were seven classes of business and we were considering

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1 all of these often together.
 2 It's quite difficult, if this judgment is
 3 consistent, my Lord -- and I take it that it is --
 4 then --
 5 LORD JUSTICE FLAUX: Well, it's certainly intended to be.
 6 MR GAISMAN QC: Quite. All that your Lordships were saying
 7 is whether there's an inability to use is always
 8 a question of fact. Well, of course it is. Of course
 9 it's a question of fact if you just say that, but there
 10 are other principles at stake here.
 11 LORD JUSTICE FLAUX: Mr Gaisman, isn't the point --
 12 Mr Edelman addresses the inability to use and how
 13 inability to use may be a question of fact. Leave to
 14 one side for the moment what we've said about it being
 15 at most a hindrance in use, and I follow your point on
 16 that, but isn't the short answer to all of this that,
 17 given the finding in 415, that at most there was
 18 a restriction on use but it could not be said that it
 19 was imposed by order of the government, the beginning
 20 and the end of it because, whatever the facts are,
 21 that's a complete answer.
 22 MR GAISMAN QC: Or to put the point another way, my Lord,
 23 supposing that your Lordship had used the word
 24 "inability" in that last sentence. So it read:
 25 "Even if there was an inability of use, it cannot be

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1 said that any such inability on use was imposed by order
 2 of the government."
 3 It's another way of putting the same point. But
 4 your Lordship is quite right, there were two separate
 5 questions here.
 6 LORD JUSTICE FLAUX: All that your declaration at 17.4(b)
 7 does is to say "did not suffer an inability to use due
 8 to restrictions imposed within the meaning of Hiscox
 9 1-4".
 10 MR GAISMAN QC: Yes, which is exactly what your Lordships
 11 said in paragraph 415.
 12 LORD JUSTICE FLAUX: It's exactly what we said in 415.
 13 MR GAISMAN QC: Yes.
 14 LORD JUSTICE FLAUX: Albeit in the context of restriction on
 15 use, but clearly restriction on use by definition is
 16 less than inability to use.
 17 MR GAISMAN QC: Yes. So, my Lords, that's the submission.
 18 There may be an answer to it but it hasn't yet been put
 19 forward against me.
 20 Now, can I then move on from there to declaration
 21 17.4(a) on the previous page.
 22 Now, there's -- I'm really going to deal first with
 23 the issues between me and the FCA.
 24 There are four problems with the FCA's draft in
 25 front of your Lordships' 17.4(a). The first is -- the

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1 first sentence treats regulation 6 as ipso facto
 2 a restriction imposed, and that is not what the court
 3 decided in relation to categories 3 and 5. The language
 4 you've got at the moment is:
 5 "The words 'restrictions imposed' mean something
 6 mandatory... and in particular Regulation 2 ... 4 and 5
 7 and [they add] 6."
 8 It's quite clear that regulation 6, whatever the
 9 effect of my previous submission, is in a different
 10 class from regulations 2, 4 and 5 because 2, 4 and 5
 11 shut down businesses and 6 kept people at home. But
 12 this is insurance of premises, of business premises. So
 13 our wording is better because it treats regulation 6 as
 14 not the same.
 15 Your Lordships will search paragraphs 267 to 270 in
 16 vain for any such elevation of regulation 6.
 17 LORD JUSTICE FLAUX: You deal with this point by saying that
 18 regulation 6 is capable of being a restriction imposed
 19 on the facts in any given case.
 20 MR GAISMAN QC: The humorous aspect of that submission is
 21 that both of my learned friends have said exactly that
 22 during the course of their submissions. Mr Edelman said
 23 it may or may not be, which I take to be the same as
 24 it's capable of being, and Mr Lynch, for which I must
 25 buy him a drink in due course, actually said that the

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1 right thing to say was that it was capable of being,
 2 having momentarily overlooked the fact that those were
 3 the terms of the declaration.
 4 Now, it is capable of being a restriction imposed
 5 because it's mandatory and it is said to apply to
 6 businesses which were ordered to close.
 7 LORD JUSTICE FLAUX: Mr Lynch's formulation of this
 8 particular provision appears to recognise in the last
 9 sentence that it's a question of fact whether regulation
 10 6 -- well, no, maybe that's dealing with inability to
 11 use. He doesn't really deal with regulation 6. He
 12 certainly doesn't seem to think that regulation 6 is
 13 necessarily within the mandatory restrictions imposed.
 14 MR GAISMAN QC: He's more dovish on this point but he's more
 15 hawkish on a different point. But anyway,
 16 your Lordship's not counting heads.
 17 So that's the first point, that the FCA overpromote
 18 regulation 6 in your Lordships' judgment.
 19 The second point is that they don't like our words,
 20 perhaps -- I was going to say they don't like our words
 21 "in particular" but I see that the words "in particular"
 22 are there.
 23 Sorry, I've rather lost touch with what the point
 24 I'm trying to make is about that. It seems that the FCA
 25 accept the words "in particular". Anyway, "in

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1 particular" is in your Lordships' judgment at 267. So
 2 that's all right. Maybe those words have come back in.
 3 Sorry, I'm making a point on a previous draft, I think.
 4 Thirdly, I hope I don't have to spend time on the
 5 word "necessarily".
 6 And, fourthly, my learned friend appears to be, by
 7 looking at the red about six lines down, to be treating
 8 social distancing and related action as being comprised
 9 within regulation 6, because he says "Social Distancing
 10 and Related Action save for Regulation 6...", implying
 11 that there are some respects in which social distancing
 12 and related action may have fallen within regulation 6.
 13 Well, that's not right.
 14 LORD JUSTICE FLAUX: Regulation 6 was staying at home as
 15 much as possible, working from home and so forth.
 16 MR GAISMAN QC: Yes, nothing to do with social distancing.
 17 LORD JUSTICE FLAUX: Nothing to do with social distancing.
 18 MR GAISMAN QC: And social distancing was never the law and
 19 your Lordships have held that it therefore couldn't be a
 20 restriction imposed because restrictions imposed have to
 21 have the force of law.
 22 LORD JUSTICE FLAUX: Yes.
 23 MR GAISMAN QC: So all of these drafting points, perhaps
 24 unusually, should be resolved in favour of one party,
 25 namely Hiscox.

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1 However, on the plus side, although my learned
 2 friend Mr Edelman unfortunately retreated from this
 3 position for the first time in oral argument a few
 4 minutes ago, what everybody had agreed about, apart from
 5 the Hiscox Action Group, was that the declaration could
 6 contain the words:
 7 "... whether regulation 6 would have caused an
 8 inability to use the premises would be rare."
 9 My learned friend's position on that met with
 10 a certain amount of resistance. That's what
 11 your Lordships said and, by the way, that wasn't
 12 confined or even directed to regulations 3 and 5. It
 13 was a general statement.
 14 The important point is that my learned friend
 15 Mr Edelman said: well, it shouldn't be in the
 16 declaration because it's just a prediction. It's not
 17 a prediction. It is an expression of opinion by
 18 your Lordships about the way in which these regulations
 19 work, and since it's in the judgment there can be no
 20 good reason why it should not be also in the
 21 declaration.
 22 Now, that said, and I'm not quite sure to what
 23 extent it was really pursued in the light of
 24 your Lordship's resisting Mr Edelman's retreating from
 25 the word "rare", the Hiscox Action Group basically had

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1 told your Lordships that your Lordships were wrong on
 2 this. Where your Lordships said this was a rare case
 3 Mr Lynch's position is no, it's not a rare case.
 4 LORD JUSTICE FLAUX: Well, they will be able to establish in
 5 any given case whether they're right or wrong, won't
 6 they?
 7 MR GAISMAN QC: Yes.
 8 LORD JUSTICE FLAUX: On the basis of the material that we
 9 were given at the time, we concluded that it would be
 10 a rare case, and at the moment I continue to consider
 11 that's a fair conclusion on the basis of material we
 12 had, which is all we can go on.
 13 MR GAISMAN QC: Yes, my Lord, but your Lordships had quite
 14 a lot of material, including all the assumed facts, and
 15 argument was addressed to this very point. The FCA
 16 addressed it on Day 2 at pages 149 to 151
 17 {Day2/149-151}. It was addressed in the HAG skeleton.
 18 Your Lordships weren't, as it were, taking a flyer at
 19 this.
 20 But it's not just a question of fact; it's also
 21 a question of how these regulations work as a whole.
 22 Now, I think that's probably all I need to say on
 23 17.4(a).
 24 MR JUSTICE BUTCHER: Well, Mr Gaisman, just before you leave
 25 17.4(a), going back to your point about social

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1 distancing and related action save for regulation 6 —
 2 MR GAISMAN QC: Yes.
 3 MR JUSTICE BUTCHER: — isn't this all to do with the
 4 definition of social distancing and related action which
 5 appears in 14.5(b)?
 6 MR GAISMAN QC: Yes.
 7 That may be right, sorry. Could I ask my Lord
 8 Mr Justice Butcher to... no doubt only for a few
 9 seconds.
 10 That may be right. I think it's just a carve-out
 11 from —
 12 MR JUSTICE BUTCHER: I think it's just a carve-out from the
 13 definition of social distancing and related action.
 14 LORD JUSTICE FLAUX: I don't think anything turns on this
 15 point, Mr Gaisman.
 16 MR GAISMAN QC: All right, I think I'll leave that point.
 17 Can I move on to declaration 17.3? I'm sorry to be
 18 going backwards. This is another point on which HAG are
 19 out on a limb.
 20 It's difficult to appreciate what's going on here
 21 because you've got a wab of black text and then a wab of
 22 green text, but what's going on here is this: the FCA
 23 and Hiscox are agreed on this form of this declaration.
 24 If we can go back to the previous page your Lordships
 25 see that the agreed form of this begins:

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1 "As regards Hiscox 1–4, 'inability to use' means
2 something significantly different from being hindered in
3 using or similar."

4 Now, we've seen that that's what your Lordships said
5 in terms, in those terms, in paragraph 268 of the
6 judgment. That's why the FCA and Hiscox agreed that
7 that should be in.

8 What you won't have picked up is that that is the
9 essential difference. That's left out of the Hiscox
10 Action Group's language. They don't like it.

11 LORD JUSTICE FLAUX: Well, you credit us with insufficient
12 reading of what we're given, Mr Gaisman. Certainly
13 speaking for myself, I've picked up exactly that point.

14 MR GAISMAN QC: Yes, that's very wrong of me. The drinks
15 bill is going up and up.

16 LORD JUSTICE FLAUX: The short answer to the point is your
17 rendition, yours and the FCA's agreed rendition — and
18 I think it's accepted that it should be "inability"
19 rather than "ability" — is agreed between you and
20 reflects the wording of the judgment.

21 MR GAISMAN QC: Yes, that's the short point. There's no
22 reason not to accept the FCA and Hiscox's agreed text on
23 17.3.

24 Now, 17.6, if we can go forward to that, please, on
25 the next page {N/11/15}, I think this is another case,

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1 if I've got this right — I will be corrected if
2 I'm wrong — where the FCA and Hiscox have agreed the
3 language. The objection on this occasion to the Hiscox
4 Action Group's addition of that complicated last
5 sentence beginning "the required link" is that it's
6 simply unnecessarily complicated. The point is
7 perfectly sufficiently captured in the text which the
8 FCA and Hiscox have agreed.

9 I think the last point I need to mention is
10 declaration 19, but I think that's gone, isn't it? Yes,
11 exactly, I think peace has broken out on this. The
12 Hiscox Action Group has abandoned its objection to the
13 text, Mr Edelman has proposed some additional words and
14 we don't object to the additional — removing some words
15 and we don't object to the removal of those words.
16 Thank you.

17 LORD JUSTICE FLAUX: I'm not sure I've picked up which words
18 are to be removed.

19 MR GAISMAN QC: Can we go forward to declaration 19, please,
20 the next page {N/11/16}. Next page please. Thank you.
21 Oh, it's the page after that, I do apologise {N/11/17},
22 yes, it's the words "that an insured is able to
23 demonstrate".

24 MR JUSTICE BUTCHER: I think specifically it's the words
25 "an insured is able to demonstrate".

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1 MR GAISMAN QC: Yes, exactly. Thank you. Got there in the
2 end.

3 Those are my submissions, my Lords.

4 LORD JUSTICE FLAUX: Yes, I see. Thank you, Mr Gaisman.

5 Submissions in reply by MR EDELMAN

6 MR EDELMAN QC: My Lord, that was a very lengthy spell from
7 Mr Gaisman on relatively few words, but can I start my
8 reply by dealing with the inclusion of Hiscox 2 and 3 on
9 the interruption point.

10 What clearly was on the agenda for the court were
11 the lead wordings in each category. They featured in
12 Mr Gaisman's skeleton and I've been given these
13 references, so I hope they're right, {1/14/4}. They
14 address the differences in the wordings and, in
15 particular, the number of the insuring clauses. If we
16 go on to the page, they address the differences between
17 Hiscox 1 and Hiscox 2. So that's all in there, and then
18 they go on to do the same for Hiscox 3.

19 So those were all addressed, and if we go to
20 {1/15/3} you can see that, with his usual thoroughness,
21 Mr Gaisman goes through all of the policies. One could
22 keep turning the pages and go to the next page {1/15/4}.
23 He identifies — all the way through Hiscox 2, he
24 identifies the common insuring clause. You can see he
25 identifies that there's a suppliers clause in there.

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1 So it was all set out in his appendix, and it was
2 all argued as to what "interruption" meant by reference
3 to those different forms of wording.

4 If one looks again at Hiscox 2, Mr Gaisman said
5 that — if we go to {B/8/29}, he said that in Hiscox 1
6 there were a number of clauses that could be referred
7 to. {B/8/29}, thank you. You can see here that there is
8 in Hiscox 2 a limited number of clauses. You can see
9 there's premises access, suppliers, public utilities —
10 go to the next page, please {B/8/30} — and public
11 authority. So there were only four clauses.

12 So we say it's not really a question of how many
13 contrary clauses you need to help you to decide on the
14 meaning of "interruption"; you have the word appearing,
15 and in this case it appears only in the context of four
16 insuring clauses, one of which is flatly contrary, and
17 you've held is contrary, to Mr Gaisman's suggested
18 meaning of the word "interruption". You've addressed
19 the effect of a clause such as that in the context of
20 the use of the word "interruption". It was before you,
21 and there is no reason why Hiscox should be entitled to
22 wriggle out of it.

23 It's a very unsatisfactory state of affairs that
24 Mr Gaisman puts forward when his arguments have been
25 rejected and he is now trying to wriggle out of

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1 an adverse finding. He says: well, this can all be
2 wrapped up in an appeal. But how can it be wrapped up
3 in an appeal if there's no declaration? In a sense,
4 that of itself demonstrates the necessity for
5 a declaration so that it can be wrapped up in an appeal.

6 LORD JUSTICE FLAUX: Well, Mr Edelman, one can't help
7 noticing that the specific wording chosen is what's
8 known as gun cover, insurance for the gun trade.
9 Whether it is a gun manufacturer or a gun shop,
10 supplying shotguns, the chance of there being only one
11 supplier, either of parts or of anything else, is
12 unlikely in the extreme. Most gun shops, if it's gun
13 shops, stock a wide range of different manufacturers'
14 guns. So you have to try and make sense of the
15 suppliers clause. It's very difficult to make sense of
16 it if "interruption" means complete cessation.

17 MR EDELMAN QC: And you have held that generally in relation
18 to the other clause, so it's no great leap into the
19 unknown or the unargued for you to simply endorse the
20 fact that your conclusions in respect of the Hiscox 1
21 and 4 lead wordings apply to the Hiscox 2 and 3 lead
22 wordings because they both contain a critical clause
23 which was part of your reasoning. It wasn't: well,
24 there's the suppliers clause but there are all the
25 others. You did list all the indicia which were

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1 contrary to Mr Gaisman's submissions, but any one of
2 them would have done. Maybe there might have been an
3 argument if there had only been 1 out of 20, but here
4 it's 1 out of 4, if we're doing numbers.

5 So we say it's a very unattractive and opportunistic
6 submission by Mr Gaisman and it ought to be rejected.
7 If necessary, if the court considers it appropriate to
8 issue some sort of supplemental judgment or ruling, then
9 that should be done.

10 But we submit it's sufficient on the judgment as it
11 stands and your reasoning to give the declaration on the
12 basis that it inevitably followed from your reasoning in
13 respect of 1 and 4, and you did specifically refer to
14 taking Hiscox 1 as a lead wording for this purpose. The
15 court well knew that it was only a lead wording in the
16 technical sense for the other Hiscox 1 type wordings,
17 but you referred to it in this sense as taking this as
18 the lead wording for the purposes of this point.

19 LORD JUSTICE FLAUX: Right.

20 MR EDELMAN QC: Now, I think the other substantive point
21 that I need to reply on is the category 3 and 5 point.

22 There's a certain forensic sleight of hand by
23 Mr Gaisman, because what he does is focus heavily on
24 what you said about the Hiscox NDDA clause, whereas, of
25 course, what we are addressing here is the Hiscox hybrid

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1 clause.

2 If we go back to {N/11/15} -- yes, thank you -- we
3 can see that the NDDA clause declarations start at 18,
4 and this is not in it. If we go back a page we can see
5 that this is addressing the Hiscox 1-4 hybrid clauses.

6 Now, the form of the clause that the court was
7 addressing in the passages which Mr Gaisman was so keen
8 to show you and to demonstrate, so he thought, that
9 I was ducking something in a paragraph, were addressing
10 the NDDA clause at {N/1/114}.

11 LORD JUSTICE FLAUX: Is that to be read as a whole,
12 Mr Edelman --

13 MR EDELMAN QC: Yes, it is.

14 LORD JUSTICE FLAUX: -- and I agree with Mr Gaisman about
15 that, then what we said in most of paragraph 415 is
16 flatly against your submissions on this point, because
17 if -- even assuming that there was a restriction on use
18 which amounted to an inability to use, the effect of
19 what we were saying is that it wasn't imposed by or by
20 order of the government, and that wasn't something where
21 we were saying may or may not be, it all depends on the
22 facts; it was quite a categorical finding, albeit in the
23 context of a different wording.

24 MR EDELMAN QC: Yes, but it's not actually what you said on
25 the wording itself, with respect.

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1 LORD JUSTICE FLAUX: Where is that?

2 MR EDELMAN QC: If we go back to what you were saying about
3 when you were focusing -- that was, of course, dealing
4 with prevention of access imposed, the imposed
5 prevention of access. And the hybrid clause, it was
6 inability to use due to restrictions. So under the
7 NDDA clause you were talking about the imposition of
8 a restriction of access. So the prevention of access
9 had to be imposed, and that was the context in which you
10 said what you said at 415.

11 If you want to look at the NDDA clause again, and
12 I think it is important that you do so, it's at
13 {N/1/114}, paragraph 391.

14 So the question you were addressing in 415 was: was
15 the denial or hindrance of access itself imposed by
16 a civil or statutory authority? And when you go to 415,
17 I tend to read this in the context of what you were
18 considering at the time. That's at {N/1/120}. You were
19 talking about what was directly imposed. Was something
20 imposed by the government?

21 Whereas when we come back to the hybrid clause at
22 {N/1/77}, it's posing a different question. It's asking
23 whether you are unable to use your premises and whether
24 that has been caused by restrictions imposed. It's not
25 requiring, as the NDDA clause did, that the

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1 restriction — that the restriction itself imposed the
 2 inability to use. It merely requires a causative link
 3 between the restriction and the inability to use, and
 4 that's the fundamental distinction between those two
 5 clauses. And that is why my Lord expressed yourself the
 6 way you did at 415, but then when you were dealing with
 7 this, which is talking about the inability to use being
 8 caused by restrictions imposed, as opposed to being
 9 directly imposed itself, as the NDDA clause requires,
 10 what you said was, going back to page {N/1/83} —
 11 LORD JUSTICE FLAUX: Paragraph?
 12 MR EDELMAN QC: 270. That's why you were addressing the
 13 paragraph differently, and correctly differently,
 14 because what you were saying about regulation 6 there
 15 is: we did not consider it could be said that regulation
 16 6 — although we considered risks which were not
 17 directed — we did not consider it could be said the
 18 regulation amounted to a restriction imposed of all
 19 insureds.
 20 So you weren't by any means — what you were saying,
 21 necessarily, was that regulation 6 could — and the
 22 language you've used was "lead to an inability to use",
 23 and that's the fundamental distinction between the two
 24 types of clauses and the way the court expresses its
 25 reasoning that Mr Gaisman is simply eliding.

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1 This is a causation question.
 2 LORD JUSTICE FLAUX: Okay. Right.
 3 MR EDELMAN QC: And that's a simple question: did the
 4 restriction, the regulation 6, cause an inability to
 5 use, as opposed to impose an inability to use, which is
 6 what the NDDA clause, albeit using access, what that was
 7 addressing?
 8 So the two passages in your judgment are, with
 9 respect, utterly compatible, bearing in mind that they
 10 are addressing a wording which on the face of it may not
 11 look that different, but actually are. One's requiring
 12 the result to be something which has been directly
 13 imposed, and the other something which is the causal
 14 result of a restriction that is imposed, and it doesn't
 15 say what the restriction — how the restriction must
 16 operate, whereas the NDDA clause does. It requires the
 17 prevention of access to be imposed, not it to be the
 18 result of some sort of restriction.
 19 That's why Mr Gaisman is fundamentally wrong in
 20 seeking to carry forward what you said about the
 21 NDDA clause to the very different hybrid clause.
 22 LORD JUSTICE FLAUX: Yes.
 23 MR EDELMAN QC: And why it is simply a matter of causation.
 24 And that's why he misunderstood or mischaracterised the
 25 references that both I and Mr Lynch made in relation to

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1 regulation 6, because what we said was — and if
 2 I didn't, I misspoke. What I intended to say was that
 3 regulation 6 is capable of causing an inability to use
 4 for various businesses. It is a restriction imposed and
 5 you have not said that it isn't.
 6 I quite accept that for the purposes — if the
 7 NDDA clause, going back to that — it may be useful just
 8 to see it again, the NDDA clause at {N/1/114}.
 9 I quite accept that if the NDDA clause had said
 10 "an inability to use imposed by any civil or statutory
 11 authority", and that had been the language in the hybrid
 12 clause, that Mr Gaisman would have a fair point.
 13 But that's what you were talking about, and when
 14 Mr Lynch and I used the word "capable of causing", that
 15 was referring to the causation requirement in the hybrid
 16 clause, and that is at the heart of the error in
 17 Mr Gaisman's approach. He's comparing apples and pears.
 18 LORD JUSTICE FLAUX: Right.
 19 MR EDELMAN QC: So this poses two questions, the hybrid
 20 clause: firstly, was there a restriction imposed? Does
 21 regulation 6 qualify as a restriction imposed? And,
 22 with respect, you have answered that question yes, and
 23 I don't think that Mr Gaisman objected to that. He
 24 didn't object to that part of the declaration in 17.3.
 25 LORD JUSTICE FLAUX: Well, it's 17.4 —

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1 MR EDELMAN QC: 17.4, sorry. I'm terribly sorry, I gave the
 2 wrong number.
 3 LORD JUSTICE FLAUX: Even on Mr Gaisman's wording,
 4 regulation 6 is capable of being a restriction imposed.
 5 MR EDELMAN QC: Yes. So it's capable of being a restriction
 6 imposed. Then he says it didn't impose an inability to
 7 use, and that is just the wrong question. It's then
 8 a question of fact: did that restriction have the
 9 result/cause — the word "due to" — an inability to
 10 use?
 11 Now, the court has speculated that cases in which it
 12 did cause an inability to use will be rare, and let's
 13 say that the court is right about that: you cannot shut
 14 out the prospect that that factual causation case can be
 15 made out, and trying to elide the reasoning on different
 16 clauses does not work.
 17 I think if I say any more, I will repeat myself.
 18 I think that's the nub of it. Mr Gaisman spoke at great
 19 length. I'm sure I've not answered all of his very
 20 eloquently made points, but that is at the very heart of
 21 it.
 22 LORD JUSTICE FLAUX: Right, thank you, Mr Edelman.
 23 Mr Lynch, do you want to add anything to that?
 24 Submissions by MR LYNCH QC
 25 MR LYNCH QC: My Lord, thank you, only very briefly.

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1 Your Lordships were taken to paragraph 270 by my
 2 learned friend Mr Edelman. That starts:
 3 "But although we considered that there could be
 4 'restrictions imposed' which were not directed
 5 specifically at the insured ..."
 6 Just to add very quickly, the way we get there is
 7 obviously start at 269, and your Lordships find the
 8 start of that process is not being persuaded by Hiscox's
 9 submissions that "restrictions imposed" contemplated by
 10 the authority clause necessarily had to be directed to
 11 the insured, follows on at 270.
 12 Then just very briefly on 17.4(a), so that's
 13 {N/11/14}, obviously I note the time and I definitely
 14 don't want to do myself out of a drink from Mr Gaisman,
 15 but the reason why we've selected the wording we have is
 16 because it faithfully follows the judgment. Our
 17 opening — our wording in green, "The words
 18 'restrictions imposed' mean something mandatory as
 19 a force of law", etc, up to the end of the brackets, the
 20 first sentence, is taken from paragraph 267. There's
 21 nothing — it's simply lifted directly from there. It's
 22 as simple as that.
 23 "Whether such restrictions caused an inability to
 24 use is a question of fact" is from the end of 268.
 25 (b), "A 'restriction imposed' does not necessarily

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1 have to be directed to the insured or to the insured's
 2 use of premises", that is the start of — sorry, that's
 3 the start of 269. And then the reference to social
 4 distancing and related action otherwise over the page is
 5 the end of 270, about it being the question of fact.
 6 So all of this is directly lifted from the judgment.
 7 Our submission is — obviously it's for your Lordships
 8 to choose the wording, but that wording is faithful to
 9 the judgment, and so I hope that that is suitable
 10 wording and there's nothing inappropriate there.
 11 Maybe my learned friend Mr Gaisman was confused by
 12 the cross-reference to social distancing at 14.5(b), but
 13 otherwise nothing to add and we adopt Mr Edelman's
 14 submissions, thank you.
 15 LORD JUSTICE FLAUX: Right. Thank you. Well, we will
 16 retire to our parallel room to consider this matter.
 17 (3.48 pm)
 18 (Pause)
 19 (3.54 pm)
 20 Ruling
 21 LORD JUSTICE FLAUX: Right, taking the points in turn, first
 22 of all, whether or not the references in 17.2 and,
 23 I think, later on in 18.3 should be to all four forms of
 24 Hiscox policy or only Hiscox 1 and 2.
 25 Despite the elegant submissions by Mr Gaisman, we

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1 consider that we were intending to deal with Hiscox 1 as
 2 effectively a lead wording for all Hiscox policies. The
 3 fact that there are fewer insuring clauses in 2 and 3
 4 doesn't seem to us to answer the point that where you
 5 have, as Mr Edelman pointed out, four insuring clauses,
 6 one of which cannot make sense if "interruption" means
 7 complete cessation, it seems to us to be a compelling
 8 answer to Mr Gaisman's point, which we consider we've
 9 dealt with in the judgment, and, therefore, we will make
 10 the declarations in the form sought by the FCA rather
 11 than the form sought by Hiscox.
 12 So far as 17.4(a) is concerned, in the fourth line
 13 we think we should delete the words in red, "and 6", but
 14 otherwise we think that we would propose to make
 15 a declaration in terms which include both Mr Gaisman's
 16 word "necessarily" and the words "and regulation 6 is
 17 capable of being a restriction imposed" in the blue, and
 18 also in the red Mr Edelman's words "save for regulation
 19 6".
 20 We were not particularly impressed by Mr Lynch's
 21 suggestion we should adopt a completely different form
 22 of words when the FCA and the insurers have essentially
 23 agreed the text with those few additions.
 24 It seems to us that those additions are entirely
 25 appropriate and in accordance with our judgment,

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1 particularly the point about regulation 6 being capable
 2 of being a restriction imposed.
 3 17.4(b) which, in a sense, was the point which took
 4 most of the time, it seems to us that that goes further
 5 in relation to the hybrid clause, which is what we're
 6 dealing with here, the Hiscox hybrid clause, a public
 7 authority clause, than paragraphs 266 to 270 in
 8 particular of our judgment which are dealing with this
 9 clause as opposed to any other Hiscox clause. And
 10 although Mr Gaisman very ingeniously as ever referred in
 11 his submissions to a number of other provisions which he
 12 said you should tie in with what we said in 266 to 270,
 13 those, in particular 415 which was dealing with the
 14 NDDA clause, are dealing with different clauses in
 15 different forms of wording and it doesn't seem to us
 16 that it is appropriate to make the cross connection
 17 which Mr Gaisman made.
 18 It seems to us that Mr Edelman is right that the
 19 distinction between the two types of clause is that the
 20 NDDA clause is talking about a restriction which itself
 21 imposes an inability to use and it's in those
 22 circumstances that we reached the conclusion we did in
 23 the second half of paragraph 415 of the judgment,
 24 whereas the hybrid clause is really looking at whether
 25 there is a causal connection between inability to use on

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1 the one hand and the restriction imposed on the other.
 2 That is an issue of causation, as Mr Edelman pointed
 3 out, and it seems to us, therefore, that here one is
 4 looking at causation, which is always a question of fact
 5 as opposed to construction, and therefore it seems to us
 6 that we will not make a declaration in the form of
 7 17.4(b) at all.
 8 I think 17.6 is now accepted.
 9 Moving on, then, 18.3 we've already dealt with, and
 10 19 we will make the declaration sought in the form
 11 sought by the insurers but, as agreed between the
 12 parties, by deleting the words "an insured is able to
 13 demonstrate" in the first two lines.
 14 I think that's dealt with all the declarations, has
 15 it not, Mr Edelman?
 16 MR EDELMAN QC: Yes, it has, my Lord, and that deals with
 17 the declarations now in their entirety.
 18 There are some things going on in the background
 19 which I'm not entirely clear about. I just wondered if
 20 it's perhaps best -- we have actually been going for two
 21 hours without a break.
 22 LORD JUSTICE FLAUX: I'm absolutely conscious. If
 23 I'm feeling tired I'm sure a lot of other people are
 24 feeling tired. We may have to go on until 5 o'clock.
 25 That will stop Mr Gaisman from buying Mr Lynch his drink

1 in some socially distanced public house near the Temple
 2 where only six people can gather, but so be it.
 3 Does going on until 5 o'clock if we have to cause
 4 any difficulties?
 5 MR EDELMAN QC: Not on my account. I'm sure others will say
 6 if it does.
 7 Substantively, unless there are any issues that
 8 arise, and none arise from my perspective, but unless
 9 there are any substantive issues on the certificates or
 10 the permission to appeal to the Court of Appeal, which
 11 I apprehend will be very quick, we only have now left,
 12 although it is substantive, Qatar Insurance Company's
 13 applications.
 14 LORD JUSTICE FLAUX: Yes, and also 11 --
 15 MR EDELMAN QC: Yes, I'm just trying to see if that's -- the
 16 break would enable me to see -- I can't remember whether
 17 we have had a break. We may have had a break.
 18 LORD JUSTICE FLAUX: If I say 15 minutes, is that sensible?
 19 MR TURNER QC: Can I just remind your Lordships you wanted
 20 to hear from me on RSA 3 as well, on the general
 21 exclusion.
 22 LORD JUSTICE FLAUX: Oh yes.
 23 MR TURNER QC: It's not going to be a very long point but
 24 I do want to be able to make it.
 25 LORD JUSTICE FLAUX: All right, Mr Turner. Of course you

1 can make it.
 2 MR GAISMAN QC: My Lords, can I just go back to 17.6,
 3 please.
 4 LORD JUSTICE FLAUX: Yes, sorry, Mr Gaisman, yes.
 5 MR GAISMAN QC: I'm not quite sure that my Lord,
 6 Lord Justice Flaux -- you said that you thought that was
 7 now accepted. Does that mean that the language which --
 8 LORD JUSTICE FLAUX: Yes, I'm sorry, Mr Gaisman, I shortcut
 9 that one, you're quite right.
 10 17.6 is yet another example where the FCA and the
 11 insurers agree a form of wording which seems to us to be
 12 entirely appropriate and the HAG addition is
 13 unnecessary. So we'll make the declaration in the form
 14 in the original black text.
 15 I think that deals with your point, Mr Gaisman? He
 16 has gone.
 17 Okay --
 18 MR GAISMAN QC: It does. Sorry, my Lord, everything takes
 19 a long time around here. It does, thank you very much.
 20 LORD JUSTICE FLAUX: At least you haven't made a screeching
 21 noise today, anyway.
 22 Well, it's 16.02, so I'll say 4.17; okay?
 23 (4.02 pm)
 24 (A short break)
 25 (4.16 pm)

1 LORD JUSTICE FLAUX: Are we ready?
 2 MR EDELMAN QC: I am, my Lord, yes.
 3 I think there are some loose ends on declarations
 4 I just need to tidy up. It will just take a few
 5 minutes.
 6 LORD JUSTICE FLAUX: That sounds like a good idea. Hang on,
 7 Mr Edelman. My window has just blown open.
 8 Yes.
 9 MR EDELMAN QC: I think unlike the hearing, we haven't
 10 missed any good weather outside.
 11 LORD JUSTICE FLAUX: I just had to open the window,
 12 otherwise it becomes -- all the hot air emerging from
 13 the virtual bench makes the room very hot!
 14 Submissions by MR EDELMAN QC
 15 MR EDELMAN QC: My Lord, {N/11/6}, can we have that up on
 16 screen, please? Yes, 11, page 6. It's paragraph 11.2.
 17 Perhaps I'll just get on with it without the screen up
 18 if my Lords have it. Ah, here we go.
 19 I think the stage we've reached now is that
 20 Mr Salzedo will not be pursuing the addition of the
 21 words in blue on the basis of a form of wording proposed
 22 by Mr Salzedo which we have agreed. You should have
 23 received by email a new paragraph, 11.3 and obviously
 24 other things -- not to supplant the existing one, but
 25 an additional paragraph, hopefully you have received by

1 email. I think this was the one that you received at
2 about lunchtime or at about 2 o'clock or so {N/11/7}.

3 I'll read it out:

4 "[as read] For the avoidance of doubt in respect of
5 declaration 11.2, the court has not decided and does not
6 declare whether the correct counterfactual does or does
7 not retain the existence or effect of or public response
8 to COVID-19 which was instigated prior to the time when
9 cover was triggered under the policy but which was not
10 continued after that time."

11 The only disputed element is we want to add -- if
12 insurers are getting an additional paragraph about what
13 the court didn't deal with, bearing in mind what
14 my Lord, Lord Justice Flaux, said this morning about the
15 existence or effect of COVID outside the UK, we consider
16 it's appropriate also to record that. Ordinarily we
17 wouldn't want declarations about what was and wasn't
18 considered, but if the insurers are having something in
19 on this, we don't see why we shouldn't do as well.

20 So that's the only contentious bit. Insurers won't
21 agree to that. They want their bit about what wasn't
22 considered but they don't want our bit about what wasn't
23 considered.

24 Submissions by MR SALZEDO QC

25 MR SALZEDO QC: My Lord, there are two problems. One is

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1 Mr Edelman inserted a "not" when reading, which I'm sure
2 was an innocent error which I'm sure your Lordships will
3 have spotted.

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

5 MR SALZEDO QC: We will have it without the "not". The more
6 substantive point is we don't agree about what the
7 outcome was of this morning's debate about (c), but
8 what's essentially happened, at the end of a very long
9 day, is that I raised a point about a certain timing
10 issue, the one that these words cover, which it seemed
11 to us was ambiguous in the form of the FCA's
12 declaration, and your Lordship has put to me in argument
13 a preliminary view that it hadn't been decided, and
14 I accepted that, and said that, given that my concern
15 was that the FCA wording was ambiguous, we should make
16 it clear that was accepted.

17 There was then a quite separate argument about
18 a different point about whether the relevant cause was
19 nationwide or worldwide which was resolved in favour of
20 the submissions made by Mr Turner that it was to be
21 UK-wide. One of the grounds on which that was decided
22 was that it was to make (c) consistent with (a). Then
23 what's now happened is that my fulfilling my promise to
24 provide some wording to sort out (a) has led to the FCA
25 seeking to reverse the result of the debate that we had

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1 this morning, and in my submission that's inappropriate.

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

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

10 MR SALZEDO QC: Yes, exactly, and we're content with that,
11 but as I understand it, the FCA is no longer content
12 with that.

13 LORD JUSTICE FLAUX: Why do we need any more than that
14 wording --

15 MR EDELMAN QC: My Lord, just as happened when Mr Salzedo
16 raised a point about his -- his point and you said that
17 wasn't within the trial, and Mr Salzedo said: well, then
18 can I have a declaration that it wasn't, the same thing
19 happened to me a few -- a paragraph later on in the UK
20 point, which is all agreed, that change is agreed, and
21 you said: but the impact of worldwide wasn't within the
22 trial. And it's a bit of what's sauce for the goose is
23 sauce for the gander. If Mr Salzedo and the insurers
24 want it recorded what wasn't debated by the court, why
25 shouldn't we as well when the court made that clear this

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1 morning? But that's the sum total of it.

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

4 MR EDELMAN QC: Do you have the text available, my Lord.

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

7 "[as read] For the avoidance of doubt, in respect of
8 declaration 11.2 the court has not decided and does not
9 declare whether the correct counterfactual does or does
10 not retain the existence or effect of public authority
11 or public response to COVID-19 which was instigated..."
12 It's that one, is it?

13 MR EDELMAN QC: Yes, and then (b) is our addition, which is
14 contested.

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

17 MR SALZEDO QC: My Lords, before you rise, can I just say
18 that if your Lordships are minded to accept Mr Edelman's
19 submission now that the matter on which, as we
20 understood it, he lost on UK versus worldwide was not in
21 the trial, then I do have some submissions to make on
22 that, my Lords. I have started with a preliminary
23 point, in the hope of shortcutting this, that it's too
24 late to go back over that argument.

25 LORD JUSTICE FLAUX: One other possibility is we simply

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1 don't add this in at all and we leave it with 11.2 as is
 2 with the amendment to (c) that we've discussed.
 3 MR SALZEDO QC: Well, as your Lordships know, I made the
 4 submissions earlier that the problem with that was that
 5 (a) does — there is the potential for someone to
 6 suggest that (a) clearly does include the public
 7 authority responses that were — that had happened in
 8 that time period before the peril was triggered.
 9 LORD JUSTICE FLAUX: Yes, I follow that point.
 10 MR SALZEDO QC: That was the submission I made and we
 11 reached a resolution of that, and it is not satisfactory
 12 that the FCA are now seeking to piggyback on that —
 13 LORD JUSTICE FLAUX: Why don't Mr Justice Butcher and I just
 14 briefly discuss whether we're even prepared to consider
 15 Mr Edelman's additional point, and then we'll know
 16 whether we need to hear more from you.
 17 MR SALZEDO QC: My Lord.
 18 (4.24 pm)
 19 (Pause)
 20 (4.25 pm)
 21 Ruling
 22 LORD JUSTICE FLAUX: Right, well, we both feel very strongly
 23 that Mr Salzedo's draft addresses the point — the
 24 specific point that we were concerned about this
 25 morning, on which we could see the force of what he was

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1 saying, and we just think it's quite wrong for the FCA
 2 to seek to now piggyback in an additional point on which
 3 they've effectively lost.
 4 So we will allow Mr Salzedo's 11.3 without the red
 5 amendments. So we don't need to hear any more from you
 6 on that point, Mr Salzedo.
 7 MR SALZEDO QC: Thank you, my Lord.
 8 LORD JUSTICE FLAUX: Obviously the current 11.3 becoming
 9 11.4, but that can all be dealt with in the final draft.
 10 MR EDELMAN QC: Yes, absolutely.
 11 LORD JUSTICE FLAUX: Right.
 12 MR EDELMAN QC: And then one final point which is,
 13 I'm pleased to say, agreed. In 11.3(c), which was our
 14 addition, originally it was our red (d), if we go to
 15 {N/11/8} —
 16 LORD JUSTICE FLAUX: Yes.
 17 MR EDELMAN QC: We've been asked to change the words at the
 18 end "absent the insured peril" to "if the insured peril
 19 had not been triggered" and we have agreed.
 20 LORD JUSTICE FLAUX: Right. Well, you can include that in
 21 the final form of the order.
 22 Submissions by MR EDELMAN QC
 23 MR EDELMAN QC: Yes. So that deals — that does, finally,
 24 deal with declarations, and then we're on to
 25 certificates and the allied topic of permission to

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1 appeal to the Court of Appeal and the extension of time
 2 for filing of notice.
 3 Certificates. Hopefully you've seen our application
 4 and all the other parties' applications.
 5 Two points to make by way of preliminary
 6 observation. Firstly, as we understand it,
 7 Ecclesiastical, having seen that we don't appeal the
 8 decision in their favour on the exclusion, have decided
 9 to withdraw — as I understand it, withdraw their
 10 application for a certificate because there's nothing
 11 for them to appeal in the sense that the favourable
 12 decision against — for them is not being challenged by
 13 the FCA.
 14 And the second preliminary point is the Hiscox
 15 Action Group want to seek to make an application for
 16 a certificate without being joined as a party.
 17 We have — if they can satisfy you that they're
 18 entitled to do that, we have no objection to it, but
 19 their alternative application is to be joined and the
 20 FCA would object to that because the FCA is essentially
 21 the claimant and wishes to remain, as such, the sole
 22 claimant and, if necessary, if for any reason the Hiscox
 23 Action Group cannot issue their application for
 24 a certificate without being joined, and are not joined,
 25 then they'll just have to intervene on the appeal.

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1 LORD JUSTICE FLAUX: I was about to say, isn't the short
 2 answer that they intervene on the appeal?
 3 MR EDELMAN QC: Well, that seems to be —
 4 LORD JUSTICE FLAUX: If their Lordships give permission,
 5 which I would apprehend they will — although, who
 6 knows, they might not I suppose — the action group can
 7 make an application to intervene on the basis that they
 8 intervened before the Divisional Court and therefore
 9 they should be entitled to intervene before the Supreme
 10 Court. But ultimately it's a matter for the Supreme
 11 Court, isn't it?
 12 MR EDELMAN QC: Yes, these are just certificates to give us
 13 the status to apply —
 14 LORD JUSTICE FLAUX: I think Mr Lynch must be right that the
 15 certificate is something that is only granted in respect
 16 of the parties to the proceedings.
 17 MR EDELMAN QC: Well, that's how it seems to us. Obviously
 18 if HAG have a different take on it they can make
 19 submissions accordingly, but that's how we perceive it.
 20 In fairness, I haven't done the research on it. It's
 21 their lookout in a sense. But the one thing we do
 22 oppose, as we oppose, as you have seen, with QIC, is the
 23 joinder of any additional parties at this stage.
 24 LORD JUSTICE FLAUX: Yes.
 25 MR EDELMAN QC: The certificates you have seen. I've

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1 already made the submission at the outset about the
 2 preferred form of order. I hope that's not contentious.
 3 It's merely a drafting point. But for completeness, the
 4 orders ought to refer to the grounds of appeal, as
 5 a number of them do, so it's only just --
 6 LORD JUSTICE FLAUX: Well, subject to any point anybody
 7 wants to take about that, I think it seemed to us it's
 8 appropriate that certificates should refer to grounds of
 9 appeal because then everybody knows where they stand and
 10 there's no uncertainty. I don't imagine that's going to
 11 be disputed.
 12 MR EDELMAN QC: I hope not.
 13 Then permission to appeal to the Court of Appeal.
 14 That's to guard against the possibility of the Supreme
 15 Court refusing permission either on all or some grounds.
 16 As my Lord said, we don't apprehend that happening
 17 because, as far as we're aware, they're ready and
 18 waiting for us to come.
 19 LORD JUSTICE FLAUX: Well, the practice -- or the Supreme
 20 Court rules, I think, or the Practice Direction,
 21 I forget which, provides, doesn't it, that in a case
 22 like this, if they were to refuse permission, then you
 23 can have an extension of time from the court at first
 24 instance for -- until 14 days after the Supreme Court
 25 has dealt with the application for permission to appeal.

1 MR EDELMAN QC: And Mr Turner has very helpfully set out
 2 a draft order to that effect in his skeleton at
 3 paragraph 32 {P/8/13}. Just so my Lords can see it,
 4 I'm sure you have read it --
 5 LORD JUSTICE FLAUX: Yes, I can see that.
 6 MR EDELMAN QC: And that's the form of order which he has
 7 helpfully set out which we would endorse.
 8 So, my Lord, unless there are -- unless any insurers
 9 wish to say anything on the subject, or unless my Lords
 10 have anything to say on the subject, I think the only
 11 issue on this topic, if my Lords are minded to grant
 12 those certificates, was the point that was raised in
 13 relation to an aspect of RSA's grounds, on which we make
 14 no comment.
 15 LORD JUSTICE FLAUX: No.
 16 MR KEALEY QC: My Lord, this is Gavin Kealey. Before RSA
 17 responds, if RSA is going to respond, I just make the
 18 Ecclesiastical's position clear.
 19 My learned friend is absolutely right, given that
 20 the FCA is not appealing the decision in relation to the
 21 Ecclesiastical, the Ecclesiastical is withdrawing its
 22 application, which was prophylactic in the first
 23 instance, for a certificate to go to the Supreme Court.
 24 I should, however, make it clear that the
 25 Ecclesiastical is maintaining its prophylactic

1 application to the Court of Appeal to cross-appeal as
 2 a matter of precaution at the moment, my Lord. I don't
 3 believe that there is any controversy about that.
 4 Mr Edelman I saw nodding at the appropriate time, and
 5 now shaking his head at the appropriate time, and now
 6 nodding it again at the appropriate time, and therefore
 7 on that basis I shall say no more.
 8 LORD JUSTICE FLAUX: Yes, Mr Kealey. Jolly good, right.
 9 Submissions by MR TURNER QC
 10 MR TURNER QC: My Lord, you indicated at the outset of
 11 today's hearing that you would like to hear from me in
 12 relation to RSA 3, and specifically general exclusion L,
 13 in the context of the application for permission to
 14 appeal to the Court of Appeal.
 15 This is -- there's no pressure on me in relation to
 16 this particular application because this is a loose
 17 thread which could unravel the entirety of
 18 a consolidated appeal to the Supreme Court if I can't
 19 persuade you. So I'm going to do my best to persuade
 20 you that you should accept that there are proper grounds
 21 to appeal to the Court of Appeal in relation to general
 22 exclusion L.
 23 My Lord, the reason for that is because of the
 24 wrinkle introduced by section 15(3) of the
 25 Administration of Justice Act, which effectively

1 requires you to be satisfied that the decision that
 2 you're certifying is a decision where there would be
 3 proper grounds to go to the Court of Appeal.
 4 My Lord, just briefly, because you're familiar with
 5 the arguments in relation to this exclusion, and will be
 6 familiar with your Lordship's grounds for holding
 7 against RSA in relation to the exclusion, we say two
 8 things. The first is that there are arguments which
 9 have a reasonable prospect of success and therefore
 10 satisfy the test for an application for permission to
 11 appeal to the Court of Appeal; and, second, that there
 12 are other compelling reasons why you should be willing
 13 to grant permission to go to the Court of Appeal.
 14 Can I take the first of those, and really there are
 15 two thematic points that I would make.
 16 The first is the court's finding at paragraph 117 of
 17 its judgment that the exclusion cannot override
 18 an express grant of cover in respect of disease in our
 19 submission begs the question. The argument that could
 20 be advanced to the contrary is that if the insuring
 21 clause and the exclusion are construed alongside each
 22 other, then, we submit, the grant of cover would not
 23 extend at least to an epidemic. That would answer the
 24 problem with which your Lordships grappled in
 25 paragraph 117, and we say that that is an entirely

1 conventional approach to construction following the
 2 Supreme Court's decision in Impact Funding.
 3 My Lord, the second argument, which is related but
 4 distinct, is that the court's approach to the general
 5 exclusion effectively puts a red line through the
 6 exclusion of epidemic. RSA would submit on appeal, as
 7 it did at first instance, that it is perfectly possible
 8 for an exclusion in respect of epidemic to live
 9 alongside cover for disease and that the court's
 10 approach is, therefore, properly susceptible to
 11 challenge with a reasonable prospect of success, because
 12 the effect of the court's ruling is to ignore the
 13 authority or to give inadequate weight to the authority
 14 along the lines that the court should construe the
 15 exclusion with a predisposition to resolving any
 16 potential inconsistency between the terms of cover and
 17 the terms of the exclusion. And, my Lord, that's
 18 Lord Goff's opinion in the Yien Yieh Commercial Bank
 19 case that was cited to you at first instance which has
 20 been applied by the Court of Appeal on at least two
 21 occasions.
 22 We submit that if that approach had been followed,
 23 then it could and would resolve the potential
 24 inconsistency between the grant of cover on the one hand
 25 and the exclusion on the other.

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1 My Lord, before I move on, could I ask you if you
 2 have available to you Mr Hofmeyr's first skeleton
 3 argument on his application.
 4 LORD JUSTICE FLAUX: Yes, I think so.
 5 MR TURNER QC: If you have his application bundle then the
 6 reference is tab 4 in his application bundle and it's
 7 pages A31 to A33 and it's paragraph 18(3).
 8 LORD JUSTICE FLAUX: Sorry, Mr Turner. I've got everything
 9 loose. It seemed to be a good idea at the time.
 10 MR TURNER QC: It's the first skeleton argument that was
 11 dated the 28th.
 12 LORD JUSTICE FLAUX: Paragraph?
 13 MR TURNER QC: 18. It's towards the end.
 14 LORD JUSTICE FLAUX: Yes.
 15 MR TURNER QC: And could I just ask you to run your eye over
 16 subparagraph (3)(i)-(v), please.
 17 MR JUSTICE BUTCHER: Is this going to appear on the screen?
 18 MR TURNER QC: No, I don't think so because I do not believe
 19 it is uploaded to Opus, I'm afraid, my Lord.
 20 LORD JUSTICE FLAUX: We had it by email yesterday afternoon
 21 or yesterday evening quite late. Well, I've read this
 22 several times previously.
 23 You've muted yourself.
 24 MR TURNER QC: I hope that's better.
 25 LORD JUSTICE FLAUX: Yes.

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1 MR TURNER QC: It's been a long day.
 2 LORD JUSTICE FLAUX: It has.
 3 MR TURNER QC: My Lord, I show that to you because there are
 4 different ways of essentially putting the same points
 5 with different emphasis which you'll have seen is -- you
 6 have muted yourself, my Lord.
 7 LORD JUSTICE FLAUX: Yes, I have. You don't like Mr Hofmeyr
 8 intervening but you're quite happy to adopt his
 9 arguments; that's the point, isn't it?
 10 MR TURNER QC: Well, no, all I want to do is to show you
 11 that it is an argument that's being advanced by one of
 12 the other insurers. It's relevant for two reasons. The
 13 first is it buttresses my arguments on the merits, and
 14 the second is it leads into my second point which is
 15 another compelling reason as a separate basis for
 16 granting permission to --
 17 LORD JUSTICE FLAUX: That's a separate issue and it did
 18 occur to me, although I was dismissive earlier in the
 19 day, that it might be said, particularly if you're
 20 right, that this could cause sort of procedural
 21 difficulties. That's the last thing we want to happen.
 22 It might be sensible if we just let everything go to the
 23 Supreme Court and if they chuck it out, then there will
 24 have to be -- the Court of Appeal will have to deal with
 25 it on that basis. I can't see the Supreme Court being

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1 sufficiently -- at the stage of permission wanting to go
 2 into the minutiae of each of the different insurers'
 3 arguments.
 4 MR TURNER QC: Absolutely, my Lord. Really this is just
 5 about making sure that there are no loose ends. If the
 6 Supreme Court were to give permission but we didn't have
 7 permission on general exclusion L because you hadn't
 8 certified it, then RSA would have to make a decision as
 9 to whether it was going to pursue the appeal to the
 10 Supreme Court.
 11 Even if RSA did pursue the appeal to the Supreme
 12 Court and then lost, we know that QEL might still take
 13 the point in meeting its policyholder claims that
 14 general exclusion L has force.
 15 LORD JUSTICE FLAUX: Right.
 16 MR TURNER QC: So it's much better to get this swept out of
 17 the way and it deals with all of the problems --
 18 LORD JUSTICE FLAUX: Now, in relation to your wordings,
 19 Mr Edey had a point about RSA 4 and the vicinity.
 20 I don't know if that's still pursued in the light of the
 21 indications from the court at the beginning of the day.
 22 MR EDEY QC: My Lord, the answer to that is, having heard
 23 what your Lordship has said and seen that everybody else
 24 is agreeing to a certificate, we don't press that.
 25 The only point I would make is we shouldn't thereby

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1 be taken to accept that the point on vicinity does stand
 2 a real prospect of success. We say it absolutely
 3 doesn't, but for the practical reasons and for the
 4 reasons which were practical that my Lord identified,
 5 we're not going to continue to oppose a certificate .
 6 LORD JUSTICE FLAUX: Okay. That's very helpful, Mr Edey.
 7 Mr Lynch, do you want to say anything about your
 8 status, as it were, before the Supreme Court?
 9 Submissions by MR LYNCH QC
 10 MR LYNCH QC: My Lord, yes, please. I see the time and
 11 I will be as quick as I possibly can.
 12 Obviously I noted earlier the indication given by
 13 my Lord, Lord Justice Flaux, that the indication of the
 14 court was certificates would be given to all parties ,
 15 including interveners, and I understand from exchanges
 16 recently that that position may have changed.
 17 Just very briefly , then, in terms of the Hiscox
 18 interveners having standing to make the application
 19 independently, if we please go to {S/1/1} we see the
 20 Administration of Justice Act 1969.
 21 LORD JUSTICE FLAUX: S?
 22 MR LYNCH QC: {S/1}, please. I don't know if my Lords have
 23 that in some other form. I'll read it out just to speed
 24 things up. So it's section 12:
 25 "Where on the application of any of the parties to

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1 any proceedings..."
 2 Thank you.
 3 LORD JUSTICE FLAUX: There we are.
 4 MR LYNCH QC: So the first point to make is, looking at
 5 this, this wording:
 6 "Where on the application of any of the parties to
 7 any proceedings to which this section applies the judge
 8 is satisfied ..."
 9 Et cetera. There's no definition of parties. It's
 10 not limited in any way. It's simply "parties to any
 11 proceedings to which this section applies". The
 12 interveners have obviously taken part as intervening
 13 parties in these proceedings. There's a very good
 14 reason for it to be broad because what this is not is
 15 permission to appeal. This is a form of certificate
 16 saying it's suitable for the Supreme Court to consider.
 17 LORD JUSTICE FLAUX: Well, it does, at least, if we grant
 18 you a certificate — I don't think Mr Edey is seeking
 19 a certificate , I'm not sure.
 20 MR LYNCH QC: No, I believe not.
 21 LORD JUSTICE FLAUX: It's just you, isn't it? If we grant
 22 you a certificate , that still leaves open the issue of
 23 whether the Supreme Court gives permission to appeal or
 24 whether they choose to deal with it in some other way.
 25 MR LYNCH QC: Absolutely.

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1 LORD JUSTICE FLAUX: We'll discuss it in a moment,
 2 Mr Justice Butcher and I will discuss it , but I see the
 3 force of the point. There's no definition of parties to
 4 proceedings. It seems — in the context of the way in
 5 which the case has proceeded, it seems to be unduly
 6 cumbersome to require you to be joined under part
 7 19.3(b) or whatever it is.
 8 MR LYNCH QC: My Lord, absolutely. I don't think there will
 9 be any debate, and there's certainly clearly established
 10 authority, we do have standing to go to the Court of
 11 Appeal. It would be an oddity if we had that standing
 12 but we don't have standing if the court feels it's
 13 suitable for a certificate to leapfrog —
 14 LORD JUSTICE FLAUX: It would be very odd, wouldn't it?
 15 MR LYNCH QC: It would be odd. I have many other points.
 16 LORD JUSTICE FLAUX: That's as good a point as any.
 17 MR LYNCH QC: Thank you.
 18 LORD JUSTICE FLAUX: Mr Edey, is there something you want to
 19 say?
 20 MR EDEY QC: My Lord we haven't applied for a certificate
 21 because the FCA has and we intend to continue as
 22 interveners in the Supreme Court, subject to the Supreme
 23 Court being content for us to do so. But we have
 24 your Lordship's indication , I think, that you would not
 25 think that that was an unwise thing for us to seek to

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1 do.
 2 LORD JUSTICE FLAUX: No. Alright. Okay. Well, I think
 3 Mr Justice Butcher and I will just retire briefly to
 4 consider Mr Turner's point on this point and then we can
 5 hear from Mr Hofmeyr.
 6 (4.46 pm)
 7 (Pause)
 8 (4.47 pm)
 9 Ruling
 10 LORD JUSTICE FLAUX: Right. Well, Mr Turner, whilst we
 11 still don't think that much of the point, we do follow
 12 your concern about creating a sort of procedural mishap,
 13 which we would not want to do. So even if it is that
 14 there is some other compelling reason for permission to
 15 be given to go to the Court of Appeal on general
 16 exclusion L, we would have given permission to appeal on
 17 that point as well as on everything else. So I think
 18 that avoids that particular potential difficulty .
 19 MR TURNER QC: Thank you, my Lord.
 20 LORD JUSTICE FLAUX: So far as Mr Lynch is concerned, we
 21 think that we should grant him the certificate . What
 22 happens when it gets to the Supreme Court is a matter
 23 for them and not for us. All right?
 24 MR LYNCH QC: My Lord, I'm grateful.
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1 Submissions by MR KEALEY QC
 2 MR KEALEY QC: My Lord, I'm sorry to squeeze Mr Hofmeyr and
 3 Ms Sabben—Clare unduly. There's just one point —
 4 actually it gives me great delight to squeeze Mr Hofmeyr
 5 and Ms Sabben—Clare, but anyway, putting that to one
 6 side, there's a —
 7 LORD JUSTICE FLAUX: As politically correct as ever,
 8 Mr Kealey.
 9 MR KEALEY QC: There's a formal point on the order. If one
 10 looks, as it happens, at section 12 of the
 11 Administration of Justice Act, which is at bundle
 12 {S/1/1}.
 13 LORD JUSTICE FLAUX: We've got it.
 14 MR KEALEY QC: What one finds is that your Lordship's
 15 certificate is to the effect — that is in section 12.
 16 It says "where on the application of any" —
 17 LORD JUSTICE FLAUX: Hang on a moment, Mr Kealey, the person
 18 dealing with this has put up something different.
 19 Sorry, Mr Kealey, yes.
 20 MR KEALEY QC: No, it's my fault. I've just got it in hard
 21 copy:
 22 "Where on the application of any of the parties ...
 23 the judge is satisfied ..."
 24 And it is:
 25 "The conditions in subsection (3A) ('the alternative

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1 conditions') are satisfied in relation to those
 2 proceedings, and that a sufficient case for an appeal
 3 ... under this Part of the Act has been made out to
 4 justify an application for leave to bring such an appeal
 5 ... the judge ... may grant a certificate to that
 6 effect."
 7 And if your Lordships could look at (3A), the
 8 alternative conditions are that a point of law of
 9 general public importance is involved in the decision
 10 and that the proceedings entail a decision relating to
 11 a matter of national importance or consideration of such
 12 a matter, etc, and if your Lordships look at (b):
 13 "the result of the proceedings is so significant ..."
 14 Then if your Lordships look at section 13, it says
 15 there in (1) —
 16 LORD JUSTICE FLAUX: Can we have the next page, please?
 17 MR KEALEY QC: I'm so sorry, my Lord, it's {S/1/3}:
 18 "Where in any proceedings the judge grants
 19 a certificate ... then, at any time within one month from
 20 the date on which that certificate is granted... any of
 21 the parties to the proceedings may make an application
 22 to the Supreme Court under this section."
 23 My Lord, if you could turn to bundle O, and you look
 24 at divider 6 at page 1 {O/6/1}, you will see in fact our
 25 draft order, I think, makes the mistake of not following

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1 this draft, which is Arch's draft.
 2 The order that is made or proposed to be made by
 3 Arch in our respectful submission is the correct order
 4 and the grounds are actually properly to be set out in
 5 the application to the Supreme Court. Of course that is
 6 sensible in this case because your Lordships have been
 7 fiddling with declarations all day and the grounds which
 8 have been put into draft form by many parties, including
 9 my own clients, some of them are going to be slightly
 10 modified as a result of what's been done today. Not
 11 vastly, but slightly.
 12 Therefore, what I would suggest to your Lordships is
 13 that the appropriate order to make is not for the
 14 parties to set out the grounds, but rather the order
 15 proposed by Arch should be the order that your Lordships
 16 make and then we, the parties, should set out the
 17 grounds of appeal for consideration by the Supreme Court
 18 in our application to the Supreme Court.
 19 That, as I understand it, is the way forward, rather
 20 than the way in which has been proposed, and I'm as much
 21 at fault as anybody else for not appreciating that.
 22 LORD JUSTICE FLAUX: Does Mr Edelman want to say anything
 23 about that? That would seem to follow from the wording
 24 of the statute, Mr Edelman.
 25 MR EDELMAN QC: My only concern was to get some certainty.

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1 LORD JUSTICE FLAUX: You will get the certainty, I suppose,
 2 because the applications set out the grounds and the
 3 grounds will presumably be as set out in the
 4 applications which we already have.
 5 MR EDELMAN QC: It may be that what one can have is
 6 an additional recital and upon the court considering the
 7 grounds of appeal appended to the applications.
 8 LORD JUSTICE FLAUX: Yes, that would cover it, I think.
 9 That wouldn't give rise to a statutory objection,
 10 Mr Kealey.
 11 MR KEALEY QC: No, no, that's absolutely right. I think it
 12 should be the draft grounds of appeal.
 13 MR EDELMAN QC: Yes, yes, quite, that's fine. As long as
 14 everybody has a reference point.
 15 MR KEALEY QC: I'm so sorry to have detained everybody.
 16 LORD JUSTICE FLAUX: No, not at all, that's very helpful.
 17 I would hate to get the order wrong.
 18 Okay. So we would — I haven't sort of recited
 19 seriatim compliance with section 12 of the Act, but just
 20 for the avoidance of doubt, as I'm sure you appreciate,
 21 we are both satisfied that in fact all the conditions in
 22 section 12(3)(a) are satisfied in this case, so that it
 23 is entirely appropriate that the certificate should be
 24 granted, and the order will reflect that as drafted in
 25 this particular version.

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1 I think that covers everything to date and that
 2 leaves only Mr Hofmeyr's explanation, and I'm very
 3 sorry, Mr Hofmeyr, that you have been left so late in
 4 the day.
 5 Submissions by MR HOFMEYR QC
 6 MR HOFMEYR: May it please your Lordships, I'm the driver of
 7 the van outside carrying what the court has described as
 8 "a load of rubbish".
 9 LORD JUSTICE FLAUX: Don't worry about the substance of your
 10 points. I think the issues are twofold, as we see it.
 11 One is why you didn't make an application to intervene
 12 in accordance with the case management order that the
 13 court made which required applications to intervene to
 14 be made by a date in June; and secondly, why it's
 15 necessary for you to continue with this application
 16 given that RSA have indicated they intend to appeal.
 17 MR HOFMEYR: Yes, thank you. Let me answer those questions.
 18 We are still here, despite RSA having filed
 19 an application for permission to appeal, because there
 20 remains a real problem about the case proceeding without
 21 QEL's participation. This is because, first, there
 22 needs to be an appeal on RSA 3, and second, it still
 23 appears that there may very well not be an appeal on RSA
 24 3 if QEL is not permitted to intervene.
 25 Starting with the need for an appeal on RSA 3,

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1 first, as explained in our skeleton and QEL's
 2 application, if the court's findings on the RSA 3
 3 wording are not appealed, there will be acute practical
 4 difficulties and insurers on this wording will be put
 5 into a most invidious position.
 6 On the one hand they consider that the court's
 7 decision on this wording was wrong. On the other, their
 8 regulator has said in its "Dear CEO" letter, that it
 9 expects insurers to pay in accordance with the judgment
 10 unless there is an appeal.
 11 Second, the FCA's response in its skeleton argument
 12 is that QEL can commence fresh proceedings if it
 13 considers that the judgment was wrong. This is no
 14 answer at all. The FCA's skeleton position is directly
 15 contrary to the position that it has adopted as
 16 regulator in its communication with CEOs.
 17 The FCA has said that it expects all insurers to pay
 18 claims promptly, in accordance with the judgment, unless
 19 there is an appeal. Is it withdrawing that position?
 20 It certainly has not said so in any public
 21 pronouncement. It's most surprising for a regulator to
 22 be saying that the right course of action for an insurer
 23 is to ignore the guidance that it has given.
 24 The whole point of the test case was to avoid
 25 multiple actions and the delay for policyholders that

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1 they entail. Neither the court nor the FCA should be
 2 countenancing fresh proceedings. Indeed, it's rather
 3 remarkable to see the FCA suggesting that this is the
 4 appropriate course. QEL's policyholders are, in effect,
 5 being abandoned by the FCA and left to their own
 6 devices.
 7 Third, a great deal of money turns on the effect of
 8 the RSA 3 wording. QEL estimates its own exposure at
 9 114 million and that of all insurers on the wording as
 10 750 million. That's in the evidence.
 11 Bear in mind that the FCA told the court by
 12 Mr Brewis' witness statement of 9 June 2020 that the
 13 value of total claims then made across all policies were
 14 estimated as 1.2 billion. A lot rides on RSA 3. RSA 3
 15 wording represents a big proportion of insurers'
 16 collective exposure. The amount of money at stake
 17 reinforces the point that the concerns raised by QEL
 18 about the judgment on this issue are not going to go
 19 away. Frankly, unless there is an appeal in this case,
 20 there is bound to be more litigation.
 21 So that's the first point that we make. There needs
 22 to be an appeal on RSA 3.
 23 Turning to the risk that there will be no appeal
 24 unless QEL is allowed to intervene, let me make the
 25 following points.

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1 The application was made because QEL anticipated
 2 that RSA was not going to appeal. The conversations
 3 which led to that expectation was subject to common
 4 interest privilege and so no more can be said about the
 5 basis for this. But what the court can and should take
 6 from the evidence before the court of that expectation
 7 formed by QEL is that the RSA's attitude is probably not
 8 a fight—them—on—the—beaches one that an appeal must
 9 proceed in all circumstances.
 10 Second, QEL has asked RSA for clarification. RSA
 11 replied in a letter from DWF dated 30 September, that's
 12 Wednesday, in which they stated that RSA intends to
 13 pursue an appeal "in the current circumstances", but
 14 that it "continues to engage" with the FCA and other
 15 insurers.
 16 This confirms —
 17 MR JUSTICE BUTCHER: Your position, Mr Hofmeyr, is that you
 18 will fight on the beaches?
 19 MR HOFMEYR: That is our position, yes.
 20 LORD JUSTICE FLAUX: But, Mr Hofmeyr, if Mr Turner doesn't
 21 appeal —
 22 MR HOFMEYR: Yes.
 23 LORD JUSTICE FLAUX: — then you can seek to intervene
 24 before the Supreme Court?
 25 MR HOFMEYR: We can seek to intervene before the Supreme

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1 Court, but we would have to do so — we don't know —
 2 the real problem is the matter of uncertainty. We don't
 3 know when that withdrawal will take place. It might
 4 take place at the door of the court.
 5 LORD JUSTICE FLAUX: Well, it might do. You're presumably
 6 prepared to argue the point.
 7 MR JUSTICE BUTCHER: It's not a very long point, is it,
 8 Mr Hofmeyr?
 9 MR HOFMEYR: No, it's not a long point. That's absolutely
 10 right.
 11 LORD JUSTICE FLAUX: And in any event, Mr Hofmeyr, because
 12 we took RSA 3 as effectively the specimen wording for
 13 the disease clauses, much of the argument about RSA 3 is
 14 going to be ventilated before the Supreme Court by the
 15 other insurers in any event, isn't it?
 16 MR HOFMEYR: That is correct.
 17 LORD JUSTICE FLAUX: What I might describe as the radius
 18 point is going to be ventilated by all the insurers who
 19 have got those sorts of clauses?
 20 MR HOFMEYR: That is absolutely correct, but it's not going
 21 to be considered unless RSA appeals by reference to the
 22 specific RSA 3 wording, including the exclusion, which
 23 on the court's current decision is nugatory. It means
 24 that a red line must be drawn through the word
 25 "epidemic", "pandemic", and in the circumstances that

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1 all the arguments in relation to repugnancy are alive.
 2 So we say that the position — there is still a risk
 3 that no appeal will be made unless we are permitted to
 4 intervene and that it's no answer to that, as the FCA
 5 suggest, that we must simply start declaratory
 6 proceedings against policyholders.
 7 There is a further risk and that is that there may
 8 be no action in which to intervene. In its press
 9 release published on 30 September the FCA repeated its
 10 oft-stated intention to continue discussions with
 11 insurers and action groups in order to find a solution
 12 which resolves outstanding issues as soon as possible to
 13 enable payouts on eligible claims.
 14 Now, this, of course, is a commendable aim. The
 15 intention is that the discussions will continue, and
 16 I quote, "in the coming weeks", and the hope is that the
 17 appeal will be rendered unnecessary. There is,
 18 therefore, a significant risk that the issues in this
 19 action will be compromised and the action discontinued
 20 without notice to non-participants.
 21 LORD JUSTICE FLAUX: Well, your client should have thought
 22 of that problem when they decided that they wouldn't
 23 intervene in the first place. That was always a risk.
 24 There was always a risk from day one that this action
 25 would be settled either before judgment or, more likely,

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1 after judgment in the light of the judgment, and you had
 2 the opportunity, as did any other insurer who wanted to,
 3 to join to run any separate arguments you wanted to run
 4 if you didn't think that Mr Turner could do the job
 5 properly, which appears to be what underlies this
 6 application.
 7 MR HOFMEYR: There are two points in response to that. The
 8 first is my clients made their decision not to intervene
 9 at the time they did in the light of the information
 10 which was available. If it were appropriate for
 11 insurers to have applied to intervene merely because
 12 there was a concern about a settlement by those in the
 13 action, then everybody would have had to apply on that
 14 basis.
 15 So we made a decision at the time based on the
 16 circumstances existing at the time. Those circumstances
 17 have changed.
 18 MR JUSTICE BUTCHER: The only circumstance you're relying on
 19 there was that RSA was fighting the action.
 20 MR HOFMEYR: That RSA was fighting the action and that it
 21 was unlikely that a party in the position of QEL would
 22 have been permitted to intervene in the action. That
 23 was the view that was taken and it was anticipated that
 24 the points which needed to be argued would all have been
 25 argued fully and completely.

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1 The difference between the RSA and the QEL is that,
 2 so far as the RSA is concerned, they have a number of
 3 fronts on which they are arguing, and their reasons for
 4 potentially settling may be a give-and-take in relation
 5 to different policies. That's not true in relation to
 6 QEL who have written on RSA 3 wording —
 7 LORD JUSTICE FLAUX: That, with respect, is a very similar
 8 argument to the argument that was made by both the
 9 interveners whom we did permit to intervene, albeit not
 10 in the context of the insurers, but in the context of
 11 the FCA, that the FCA had, as it were, its own interests
 12 and it would not necessarily put all the policyholders'
 13 points in the forceful way in which the policyholders
 14 wanted to put the points, because the FCA had, you know,
 15 a number of different hats and a number of different
 16 roles and therefore it was appropriate that other
 17 people, in this instance representatives of the
 18 policyholders, were permitted to intervene.
 19 If your client insurers or any other insurers who
 20 were involved with these wordings had come to the court
 21 at the time when we said any intervention must be made
 22 and had made the points that you now make about the
 23 potential that RSA might end up settling for market
 24 reasons, it seems to me, speaking for myself, we might
 25 very well have permitted intervention.

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1 MR HOFMEYR: With respect, my Lord, that argument would have
 2 been true in relation to most of the non-participant
 3 insurers.
 4 LORD JUSTICE FLAUX: That's as may be, Mr Hofmeyr.
 5 MR HOFMEYR: And a sensible decision had to be made, and we
 6 consider the decision we made was a sensible one at the
 7 time. The court was not -- did not have an additional
 8 party as a consequence. However, there is now a risk
 9 that, for commercial reasons, the argument that we wish
 10 to advance will not proceed on appeal and we wish to
 11 protect our client's position in those circumstances.
 12 LORD JUSTICE FLAUX: Well, Mr Hofmeyr, it would have been
 13 open to all the insurers -- I don't know what
 14 arrangements have been made behind the scenes. It may
 15 be that some of the insurers in relation to some of
 16 these wordings had agreements with the FCA that they
 17 would agree to be bound by particular wordings.
 18 We know, I think, that certainly one of the major
 19 British insurers writes business on the RSA 4 form. We
 20 were told that during the course of the hearing. They
 21 have not sought to intervene at any stage and it may be
 22 that that's because they have agreed to be bound by the
 23 result in relation to RSA 4.
 24 Those insurers like your client who were not
 25 prepared to be bound by whatever the result was had the

1 option to intervene or, even earlier than that, to
 2 invite the FCA to include them as one of the insurers in
 3 the test case.
 4 In one sense it doesn't matter whether there were
 5 eight of you or 15 of you: we would not have permitted,
 6 as it were, three people to run the same argument, but
 7 to the extent you had different points that weren't
 8 being run by the RSA, we would have permitted you to run
 9 them.
 10 MR HOFMEYR: With respect, my Lord, we didn't know before
 11 the action started what points would be run by the RSA
 12 and in what way.
 13 We do know that now, and we didn't clutter up the
 14 procedure by seeking to become involved at the first
 15 stage, but these -- there are very significant sums of
 16 money at stake, and the circumstances now are entirely
 17 different to those which prevailed before the action
 18 commenced, and we submit that the just way of achieving
 19 certainty for the policyholders is to permit us to
 20 intervene to ensure that this matter is appealed in this
 21 action and that we are not forced to bring declaratory
 22 proceedings against a multitude of policyholders in
 23 other actions in the future.
 24 LORD JUSTICE FLAUX: Right. Okay. Thank you.
 25 MR HOFMEYR: Unless I can assist your Lordships further,

1 those are my submissions.
 2 LORD JUSTICE FLAUX: No, that's very helpful. Thank you,
 3 Mr Hofmeyr.
 4 Now, Mr Edelman --
 5 Submissions by MR EDELMAN QC
 6 MR EDELMAN QC: Yes, my Lord. Well, we obviously oppose
 7 this very vigorously. I needn't go through the history
 8 of the procedure, because my Lords obviously have it in
 9 mind, about the steps that were taken by the FCA, not
 10 only to assemble insurers to participate in this test
 11 case, but also to publicise it and to publicise the
 12 orders that were being made, so that everybody knew that
 13 there was a deadline of 24 June 2020 for applications
 14 for intervention returnable at the second CMC, and that
 15 resulted, as my Lord has already observed, in two
 16 policyholder groups intervening. Some insurers almost
 17 applied to intervene, but in the end decided not to
 18 apply. So QEL had that opportunity.
 19 From the FCA's perspective, they have chosen who to
 20 litigate with. They've chosen the eight insurers to
 21 litigate with. They could have been forced to litigate
 22 with others if they'd applied to intervene. They
 23 haven't, and now QEL wants to foist themselves on to the
 24 FCA to litigate with them to cover the eventuality that
 25 the FCA might reach an agreement with an insurer that

1 the FCA did choose to litigate with. So this is, we
 2 submit, completely farfetched.
 3 I would also add --
 4 LORD JUSTICE FLAUX: What Mr Gaisman has described in
 5 a different context as the tail wagging the dog.
 6 MR EDELMAN QC: Yes, and I would also add that there has not
 7 been one hint of an offer to enter into the framework
 8 agreement.
 9 LORD JUSTICE FLAUX: No.
 10 MR EDELMAN QC: And that, as my Lords have seen over the
 11 period, has a number of mutual obligations. There are
 12 mutual objectives that are set there which are mutual
 13 objectives which are in the interests both of the
 14 policyholders and the insurance industry to achieve
 15 an expeditious inclusion and certainty, and if that is
 16 by achieving a settlement as a result of this judgment,
 17 so be it. That's consistent with the framework
 18 agreement and that's what the parties signed up to. Not
 19 that they signed up to settling; they signed up to
 20 working together cooperatively to try and create
 21 a situation in which those claims which could or should
 22 be paid, were paid, and if claims were not to be paid,
 23 at least everybody understood why they were not being
 24 paid and not due to be paid.
 25 Added to which this application is not even

1 compliant with the court rules. It should have been
 2 served on the FCA. The procedure that appears to have
 3 been adopted is one for the substitution of parties,
 4 which is permitted under rule 19.2.4. But
 5 Practice Direction 19 says that unless it's for
 6 substitution it has to be served in accordance with rule
 7 23, and it hasn't been served on the FCA. The FCA
 8 discovered this when it was going through the file. It
 9 was not served on the FCA and it should have been served
 10 three days before the hearing date.

11 That ties in -- it also ties in with the framework
 12 agreement point, because if we'd been served with it we
 13 could have actually raised a point with them about the
 14 framework agreement.

15 They are also actually even too late to apply for
 16 a certificate. I'm grateful to Mr Turner for drawing
 17 this to my attention because, as my Lords know, because
 18 of the time limit, section 12(4) provides that the
 19 application for a certificate has to be made to a judge
 20 immediately after he gives judgment or provide that the
 21 judge may in a particular case entertain such
 22 application at any later time before the end of the
 23 period of 14 days, beginning with the date on which
 24 judgment is given. And that has passed, so they can't
 25 even issue an application of their own for

1 a certificate. So that's a problem.

2 Can I just mention two other points. Firstly it's
 3 said, and this is important to put on the record, that
 4 somehow the regulator, the FCA, is abandoning
 5 policyholders to their fate.

6 The regulator will take regulatory action in
 7 response to this judgment if and to the extent that it's
 8 not appealed, and, if it is appealed, in accordance with
 9 the outcome of that appeal, on the basis that these test
 10 cases were run with a selected number of insurers and no
 11 other insurers asked to intervene in the action, and on
 12 that basis the FCA considers it will be entitled to
 13 pursue regulatory action by reference to this test case
 14 judgment, and there's nothing untoward about that in
 15 circumstances where this was a very well publicised
 16 piece of litigation. It's different if there was
 17 a private piece of litigation which someone didn't know
 18 about and then suddenly the FCA says: we're taking
 19 regulatory action to give effect to this judgment which
 20 nobody else knew about.

21 LORD JUSTICE FLAUX: The whole point of this test case
 22 procedure and the framework agreement under which it was
 23 adopted was that the result of this case, whether before
 24 us or in the Supreme Court, would effectively bind the
 25 insurers in the market, not formally necessarily, but

1 that it would do so in terms of your client's position
 2 as the regulator for precisely the reason that if other
 3 insurers wanted to intervene, they could and should have
 4 done.

5 MR EDELMAN QC: Absolutely. And, of course, one would have
 6 to be blind -- sorry, I shouldn't use that word. One
 7 would have to be ignorant not to realise that one of the
 8 outcomes of the judgment might be that everybody would
 9 sit down and try and work out whether they needed to
 10 appeal or whether they could live with the judgment and
 11 try and find a suitable way forward. Because one of the
 12 avowed aims of the FCA was to achieve certainty and
 13 payment of those claims which should be paid as quickly
 14 as possible, and that certainty was for the benefit of
 15 insurers as well.

16 So the whole context of this was to try and achieve
 17 a rapid solution, which the court has bent over
 18 backwards to help us to achieve, and this is an attempt
 19 to undo it.

20 The final point I want to make is we simply do not
 21 recognise the figures that QEL have given. Insurers
 22 were invited to provide to the FCA their estimate of the
 23 value of claims that had actually been made against
 24 them. And I don't want -- I won't reveal the figure,
 25 but all I can say is that it was a small fraction of the

1 figure that has been quoted by QEL -- both figures, both
 2 their figure and the maximum -- which we assume is
 3 simply calculated by taking all their policies that
 4 they've issued to all policyholders, and multiplying the
 5 limits of indemnity by the number of policies they've
 6 issued, as opposed to actually calculating, as it were,
 7 a reserve figure for the claims that have been made,
 8 which is presumably the figure that they've actually
 9 provided to the FCA. Because we got those figures from
 10 all insurers, just so that we could understand who was
 11 exposed where, which helped with the selection of the
 12 insurers, and that may be why they were so far down the
 13 pecking order given what we knew about the level of
 14 claims made against them to which they were exposed.

15 LORD JUSTICE FLAUX: Well, we've seen figures in the press,
 16 as it were.

17 MR EDELMAN QC: Yes, but that's for the entire industry.

18 LORD JUSTICE FLAUX: We've seen figures in the press for
 19 some of the other insurers' exposures, and I'm not going
 20 to name them, but I think we all know some of the
 21 insurers have indicated that position, and that is
 22 inconsistent with this sort of level of exposure, isn't
 23 it?

24 MR EDELMAN QC: Yes, I mean, this is a maximum loss
 25 exposure --

1 LORD JUSTICE FLAUX: QEL is not, as it were, one of the five
 2 major players in the market?
 3 MR EDELMAN QC: No. I will confess I'd never heard of them.
 4 And I think I've been doing — we've all been doing —
 5 LORD JUSTICE FLAUX: I had never heard of them but I'm ...
 6 you know, I don't do as much insurance work these days
 7 as you do, Mr Edelman.
 8 MR EDELMAN QC: No, well I've never heard of them. I mean,
 9 they're based in Malta, which may say something. But
 10 there we go.
 11 LORD JUSTICE FLAUX: Okay. Right. Well, I think Mr Turner
 12 probably has some submissions to make as well.
 13 Submissions by MR TURNER QC
 14 MR TURNER QC: My Lord, very briefly, I'm not going to go
 15 over the ground in my skeleton argument filed yesterday
 16 afternoon, which I hope has been read. If it hasn't, it
 17 hasn't.
 18 LORD JUSTICE FLAUX: We've read it.
 19 MR TURNER QC: Can I just deal with one point, which was
 20 Mr Hofmeyr's complaint that QEL did not know what points
 21 would be run by RSA and in what order.
 22 Could I ask for {F/1/6} to go on the screen please,
 23 which is from the framework agreement, and could I ask
 24 you to look at paragraph 2.5, which deals with the fact
 25 that both the FCA and the insurers were mindful that

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1 they would be acting effectively in a broadly
 2 representative capacity, the FCA on behalf of
 3 policyholders —
 4 MR JUSTICE BUTCHER: I'm sorry, Mr Turner, what is this?
 5 MR TURNER QC: This is from the framework agreement, so this
 6 is what all the defendant insurers signed up to but
 7 which QEL has not signed up to. But this was a public
 8 document which one assumes that QEL read at the time.
 9 Paragraph 2.5 specifically caters for both the FCA
 10 to engage under a cloak of common interest privilege
 11 with policyholders, and for the defendant insurers to
 12 engage with others in the market who may have
 13 an interest in the proceedings. So, for example, in
 14 2.5:
 15 "It is recognised ..."
 16 Four lines up from the bottom:
 17 "... that the Insurers may wish to share privileged
 18 information with each other (and with other insurers and
 19 reinsurers) on a confidential (and/or common-interest)
 20 basis and the FCA agrees not to challenge the
 21 application of such privilege."
 22 Now, my Lord, I'm not going to start waiving
 23 privilege, but you will recall an allusion during the
 24 course of my oral submissions as to how well subscribed
 25 the 52-seater coach for RSA 4 was, and all I can say,

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1 without waiving privilege, is that Mr Hofmeyr's
 2 complaint might carry a little bit more weight if QEL
 3 had made any contact with RSA about these proceedings
 4 before 5.32 pm three days ago, Tuesday this week.
 5 My Lord, that's all I have to say.
 6 LORD JUSTICE FLAUX: Thank you, Mr Turner.
 7 Mr Hofmeyr, any reply?
 8 Submissions in reply by MR HOFMEYR
 9 MR HOFMEYR: Thank you, my Lord.
 10 The real concern which we invite the court to have
 11 regard to is the risk of settlement now. That is the
 12 matter which creates the greatest concern, and in that
 13 context Mr Edelman made points in relation to what the
 14 regulator may or may not do. Those submissions need to
 15 be weighed alongside what he himself said in his
 16 skeleton argument as to what the appropriate course
 17 would be for QEL going forward. He has said it clearly
 18 in his skeleton argument. It's there for all to read.
 19 Further, on the FCA's website it is stated clearly
 20 that the judgment is legally binding on parties and
 21 persuasive guidance for the interpretation of policy
 22 wordings and clauses for others. It doesn't have any
 23 greater status than that, and the FCA has always
 24 recognised that certain insurers, if the matter were not
 25 appealed, would take the matter further themselves.

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1 On the technical points, my Lord, all I can do is
 2 tell you that the application was served formally, in
 3 accordance with the rules, on the FCA on Wednesday, and
 4 the section 12 certificate application was served in
 5 time on Monday, albeit of course we were not at the time
 6 parties. So those are points with no weight to them at
 7 all.
 8 LORD JUSTICE FLAUX: Right.
 9 MR HOFMEYR: So far as cooperation is concerned, I can tell
 10 you on instructions that my clients would be willing, if
 11 they were permitted to join the proceedings, to sign up
 12 to the framework agreement.
 13 Our application is in an attempt to uphold the
 14 process rather than to undermine it, but if we are
 15 forced by a settlement to take proceedings hereafter,
 16 that will be completely contrary to the ethos of the
 17 framework agreement and the ethos of these proceedings,
 18 and we're seeking to uphold those by our action rather
 19 than to undermine them.
 20 So far as the timing of our application was
 21 concerned, again I can't go into the details in relation
 22 to the common interest privilege, but I can say that it
 23 was only on Sunday night that we were given the very
 24 clear indication that RSA were not going to appeal, and
 25 our application was made in hurried circumstances in

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1 response to that clear information.
 2 That QEL had an opportunity to intervene at an early
 3 stage is, of course, a factor which the court must take
 4 into consideration, but it is not a decisive factor. If
 5 the circumstances change, and we say they have changed,
 6 the application to join must be considered at the time
 7 on its merits, and we submit that our application has
 8 merit, that it will not complicate the proceedings in
 9 any shape or form. The Appeal Court, in this case the
 10 Supreme Court or the Court of Appeal, will be able to
 11 regulate what submissions are made and when. So it will
 12 not complicate. All it will do will, in fact, uphold
 13 the process which has begun and prevent any future
 14 undermining of the process.

15 Unless I can assist your Lordships further, those
 16 are my submissions in reply.

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

18 The court will retire to our parallel hearing room.
 19 (5.28 pm)

20 (Pause)

21 (5.31 pm)

22 Ruling

23 LORD JUSTICE FLAUX: Right, the court has finally to deal
 24 with an application by QEL, represented by Mr Stephen
 25 Hofmeyr QC, to intervene in these proceedings,

1 an application that was made on Wednesday of this week,
 2 that is to say, Wednesday, 30 September, 15 days after
 3 judgment was published.

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

6 Firstly, it seems to us, despite Mr Hofmeyr's
 7 arguments to the contrary, that QEL could and should
 8 have sought to intervene by the deadline imposed
 9 pursuant to the case management decisions of the court
 10 and the parties to the proceedings, namely that any
 11 applications to intervene should be made by 26 June so
 12 that they could be dealt with at the second case
 13 management conference, as, indeed, we did deal with the
 14 applications to intervene by HIGA and HAG.

15 These proceedings were very public proceedings. The
 16 FCA website identified the nature of the proceedings,
 17 and it seems to us that QEL must have appreciated at
 18 that time that one of the possible consequences of the
 19 spirit of cooperation which has run through these
 20 proceedings throughout as a consequence of the framework
 21 agreement was that either before judgment, or possibly
 22 more likely after judgment, there would be a settlement
 23 of the proceedings, and given that that was always in
 24 prospect, it does not seem to us, contrary to
 25 Mr Hofmeyr's submissions, that circumstances have

1 changed at all.

2 Secondly, in fact, although Mr Hofmeyr's clients
 3 appear to have had the impression that RSA was going to
 4 settle, as matters currently stand, RSA has not settled
 5 and we consider that it would be verging on abusive for
 6 QEL to be entitled to muscle in on these proceedings in
 7 circumstances where RSA is still taking an active part
 8 and is running whatever arguments there are in relation
 9 to each of the wordings with which we are concerned,
 10 including RSA 3.

11 In the event that there is a settlement by RSA, it
 12 will be open to QEL to make an application to the
 13 Supreme Court to intervene, although they will have to
 14 do so in the knowledge that this court has refused their
 15 prior application to intervene.

16 Mr Hofmeyr made various submissions about the
 17 position of the FCA in terms of what steps it might take
 18 as a regulator and also in relation to what the FCA said
 19 was the remedy for QEL in the event there were
 20 a settlement, in other words to commence its own
 21 proceedings.

22 It is not for the court to comment at all as to the
 23 regulator's position, so we do not do so, but it does
 24 seem to us that in the event that RSA were not to
 25 appeal, to reach some settlement, and in the event the

1 Supreme Court refused an application to intervene by
 2 QEL, the course of commencing their own proceedings
 3 would be one which would be open to them.

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

8 Right?

9 Submissions by MR EDELMAN QC

10 MR EDELMAN QC: My Lord, I am afraid on this occasion I must
 11 ask for the costs of the application. They are not
 12 a party, they are not covered, they don't have the
 13 benefit of the framework agreement. They're not doing
 14 something in accordance with the framework agreement.
 15 The interventions that were made on time were in
 16 accordance with the framework agreement and the
 17 structure that everyone had agreed. This is wholly
 18 outside the agreed structure and we would ask for our
 19 costs and I suspect that Mr Turner will ask for his too.

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

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

25 LORD JUSTICE FLAUX: Well, Mr Hofmeyr?

1 MR KEALEY QC: Before Mr Hofmeyr says anything, on behalf of
 2 my clients, I'm asking for my costs. I've been sitting
 3 here for an inordinately long period of time, as have
 4 your Lordships, and it's cost my clients an enormous
 5 amount of money, I hope.
 6 MR JUSTICE BUTCHER: I suppose a question about that,
 7 Mr Kealey, is: why have you been sitting here?
 8 MR KEALEY QC: Because you may ask me a question, because
 9 I can't possibly be so rude as to disappear just in
 10 case. Of course I could have jumped in my car and
 11 driven down to Dorset, but that would have been rash and
 12 you might have criticised me.
 13 LORD JUSTICE FLAUX: Well, Mr Kealey, we certainly wouldn't
 14 have ever criticised you, but on the other hand not
 15 everybody needed to be here for this particular part of
 16 the case.
 17 I suppose it could be said, likewise, that it wasn't
 18 suggested by Mr Hofmeyr that everybody else should go
 19 home or, in Mr Gaisman's case, go to the pub.
 20 MR EDELMAN QC: My Lord, might I add this from the FCA to
 21 avoid insurers having to speak on their own behalf: that
 22 I can well understand, and the FCA would well
 23 understand, that all insurers would have an interest in
 24 who was participating in this litigation and whether
 25 they were doing so under the framework agreement or not.

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1 MR JUSTICE BUTCHER: That's a fair point, Mr Edelman.
 2 LORD JUSTICE FLAUX: That's a very fair point.
 3 Does anybody else want to say anything?
 4 MR SALZEDO QC: My Lord, none of us can speak for each
 5 other, but perhaps your Lordships would invite insurers
 6 to say if any of them are not joining in the application
 7 that has been made by Mr Kealey for his clients.
 8 MR EDEY QC: My Lord, on behalf of my clients I join in the
 9 same application for the same reasons Mr Kealey did. We
 10 simply couldn't leave without being invited to do so,
 11 my Lord.
 12 LORD JUSTICE FLAUX: I can see that.
 13 MR KEALEY QC: I think Mr Gaisman should make his appearance
 14 known and also apply.
 15 MR LYNCH QC: My Lord, I echo Mr Edey's position.
 16 LORD JUSTICE FLAUX: Mr Gaisman is not going to be drawn,
 17 Mr Kealey.
 18 MR KEALEY QC: I'm very disappointed but I know he would
 19 make the application if he were.
 20 LORD JUSTICE FLAUX: Well, Mr Hofmeyr, you're faced with
 21 a number of applications for costs here.
 22 MR HOFMEYR: I am, my Lord. We have had no schedules from
 23 anybody.
 24 LORD JUSTICE FLAUX: Well, you wouldn't get schedules, would
 25 you? I mean, it's an issue of principle. The parties

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1 can provide you with schedules of costs. Even if they
 2 had provided you with schedules of costs, the last thing
 3 Mr Justice Butcher and I are going to do at 5.40 on
 4 a Friday night is to start a summary assessment of
 5 costs.
 6 Submissions in reply by MR HOFMEYR
 7 MR HOFMEYR: No, I understand that entirely, my Lord. The
 8 reality is that only two parties signified their
 9 objection to this application. The other parties did
 10 not do so at all, at any stage. They could have done
 11 so, they did not do so. They chose to be agnostic in
 12 relation to this application, and it would be quite
 13 inappropriate and unfair in those circumstances for any
 14 of those parties to be awarded any costs in this case.
 15 So far as the FCA and RSA are concerned, we would
 16 say that it is -- a costs order against one of the
 17 applicants as interveners would be entirely inconsistent
 18 with the sentiment of these proceedings, the ethos, the
 19 spirit of cooperation. The whole process which we were
 20 seeking to join in to was a process in which each party
 21 would bear their own costs, and it -- I don't know, but
 22 I suspect that when the application was made by
 23 interveners and they succeeded in intervening, costs
 24 orders were not made at that stage against the insurers
 25 or against the FCA for resisting their intervention.

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1 So we say, for those reasons, the --
 2 LORD JUSTICE FLAUX: My recollection is that the
 3 interventions weren't resisted. There was
 4 an intervention by somebody else, by an individual
 5 policyholder, which we refused, which was resisted.
 6 But I think my recollection -- Mr Justice Butcher
 7 will confirm this or deny it -- is that HAG and HIGA
 8 intervened effectively by consent. But at all events --
 9 MR JUSTICE BUTCHER: And in relation to the intervention
 10 application which we refused, no order for costs was
 11 sought.
 12 LORD JUSTICE FLAUX: Because it was an individual.
 13 MR HOFMEYR: Again, we suggest that that was in line with
 14 the intended cooperation between the parties.
 15 LORD JUSTICE FLAUX: But that application was made on time,
 16 by 24 June, and not on 30 September.
 17 MR HOFMEYR: My Lord, your Lordship has heard my submissions
 18 in relation to that.
 19 LORD JUSTICE FLAUX: Yes.
 20 MR HOFMEYR: Intervention at that stage was for
 21 participation in the trial. Intervention at this stage
 22 is for participation on the appeal. But your Lordship
 23 has my submissions. Your Lordship will have formed
 24 a view and your Lordship will express that view.
 25 LORD JUSTICE FLAUX: Yes.

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1 Does either Mr Edelman or any of the insurers want
 2 to come back on this?
 3 MR KEALEY QC: No, thank you, my Lord.
 4 LORD JUSTICE FLAUX: Mr Edelman?
 5 MR EDELMAN QC: My Lord, I've said what I need to say on
 6 costs.
 7 Ruling
 8 LORD JUSTICE FLAUX: Well, I don't think Mr Justice Butcher
 9 and I need to retire on this one.
 10 It seems to us that, certainly as regards the FCA on
 11 the one hand and Mr Turner on the other, clearly they're
 12 entitled to an order for costs against QEL.
 13 It seems to us in relation to the other insurers and
 14 the other interveners that Mr Edelman's point is
 15 a perfectly valid point. That they had an interest in
 16 knowing what was the consequence of the result of this
 17 application, there was no suggestion that they should
 18 be, as it were, sent home, and if there had been I think
 19 they would have said: well, we have an interest in this
 20 application, and therefore we're entitled to be here,
 21 and in those circumstances it does seem to me that they
 22 are all entitled to an order for costs against your
 23 client, Mr Hofmeyr.
 24 If this application had been made on time when it
 25 should have been made, on 24 June, the position might

1 very well have been different, because then it could
 2 legitimately have been said that the application was
 3 made within the terms and spirit of the framework
 4 agreement. But your attempt, ingenious though it is, to
 5 effectively piggyback onto the framework agreement at
 6 this late stage is one which doesn't seem to us to have
 7 any merit.
 8 So I am afraid the order is one that you pay the
 9 costs of the FCA and all the insurers and interveners,
 10 to be assessed, if not agreed.
 11 MR HOFMEYR: So be it, my Lord.
 12 LORD JUSTICE FLAUX: Does that conclude today's proceedings?
 13 MR EDELMAN QC: My Lord, yes, it does as far as I'm aware.
 14 Unless anybody believes I've missed anything, that's it.
 15 LORD JUSTICE FLAUX: No, well thank you all very much.
 16 MR EDELMAN QC: I'm sorry to have made the court sit for so
 17 long.
 18 LORD JUSTICE FLAUX: No, don't worry.
 19 MR EDELMAN QC: With apologies to the staff as well.
 20 MR KEALEY QC: And on behalf of all the insurers we're very
 21 grateful to the court for all its efforts.
 22 LORD JUSTICE FLAUX: Well, not at all, Mr Kealey. Can I say
 23 on behalf of Mr Justice Butcher and myself, as I think
 24 I may have said at the end of the trial, that we have
 25 been most impressed by the spirit of cooperation which

1 has really been pervasive throughout, and we were
 2 assisted by submissions of a very high quality
 3 throughout, both at the trial and today. So thank you
 4 all very much indeed. And I hope everybody has a very
 5 good weekend.
 6 MR EDELMAN QC: Thank you.
 7 LORD JUSTICE FLAUX: Goodbye.
 8 (5.45 pm)
 9 (The hearing concluded)

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