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

Day SC1

November 16, 2020

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Monday, 16 November 2020

(11.00 am)

LORD REED: Welcome to the Supreme Court of the United Kingdom where today we are beginning a four−day hearing of appeals in proceedings brought by the Financial Conduct Authority against a number of insurance companies.

The proceedings are test cases concerned with business interruption cover in insurance policies. The purpose of the proceedings is to determine what liability, if any, the policies imposed on the insurers towards businesses that have been affected by the COVID−19 pandemic.

I am hearing the appeal with four other members of the court, whom I will introduce now. The Deputy President, Lord Hodge.

LORD HODGE: Good morning.

LORD REED: Lord Briggs.

LORD BRIGGS: Good morning.

LORD REED: Lord Hamblen.

LORD HAMBLEN: Good morning.

LORD REED: And Lord Leggatt.

LORD LEGGATT: Good morning.

LORD REED: We are going to be hearing today and tomorrow morning the submissions made on behalf of the insurance

companies who are appealing against aspects of the decision of the court below which went against them.

The insurance companies are Arch Insurance, Argenta, Hiscox, MS Amlin Underwriting, QBE UK, Royal & Sun Alliance, and later in the proceedings we'll be hearing from Zurich.

The first submissions are going to be made by counsel on behalf of QBE. That's Michael Crane QC.

So I will turn now to Mr Crane and invite him to open his submissions.

Submissions by MR CRANE

MR CRANE: Good morning, my Lord. I, as you say, appear for the fifth appellant, QBE, and before I address the court may I say on behalf of all parties that we are very grateful to the court for bringing this appeal on with such speed and we appreciate the burden that must have involved, in particular in relation to the late receipt of a mass of documentation. So we are grateful for that.

My Lord, the order of speeches on behalf of insurers will roughly follow the plan of the judgment, that is to say we will address the so−called disease clauses first before turning to those clauses that involve measures restricting or preventing access or causing an inability to use the premises.

I have been allocated from the total time given to insurers an hour and 35 minutes to be split between my appeal and responding to Mr Edelman's appeal and I intend, if I may, to open my appeal in no longer than an hour and ten minutes, but I will see how it goes and bank what's left for my reply.

I should also say that, in order to avoid duplication and because time is tight, there are two issues in which my clients, QBE, will adopt the submissions of other insurers.

The first concerns the role of "but for" causation, so−called "but for" causation, at law and under the trends clauses in each of the policies and in particular the implications for those issues of the decision in Orient−Express Hotels v Generali. Now, on this clutch of issues, I will adopt the submissions made on behalf of Amlin by Mr Kealey.

The second issue is that described in the written cases as pre−trigger losses. Now, this issue potentially affects all insurers, but it has a more profound impact on those writing restrictions on prevention of cover policies and it figures very largely in Mr Edelman's appeal, so I will say no more about that other than to say that QBE will adopt Mr Lockey's submissions made on behalf of Arch.

My Lord, my appeal is concerned only with so−called disease clauses. QBE is an appellant in relation to a group of four policies referred to collectively in the judgment as QBE1. These policies have identical so−called disease clauses, save in one respect, to which I will refer later.

I'm also responding to the FCA's appeal, the Financial Conduct Authority's appeal, against the Divisional Court's construction in QBE's favour of two policy wordings referred to in the judgment as "QBE2 and QBE3" respectively.

Now, before coming to the QBE1 wording, may I invite the court's attention to four paragraphs of the judgment of the court below, and the court will find the judgment in file C. For those with paper documents, it's behind tab 3, and the first paragraph to which I would like to refer is at paragraph 81, that's at page 57 of the electronic file {C/3/57}. Paragraph 81 starts at the foot of the page and it says this:

"It will be necessary to consider the terms of each of these policies separately as it is of course impossible to determine questions of policy coverage in the abstract. What these policies share, however are provisions which in broad terms provide coverage in respect of business interruption in consequence of or

following or arising from the occurrence of a notifiable disease within a specified radius of the insured premises."

Then there follows a sentence which is not that easy to unpack:

"In relation to each there arises the question of whether there is cover in respect of a pandemic where it cannot be said that the key matters which led to business interruption, and in particular the governmental measures, would not have happened even without the occurrence of COVID-19 within the specified radius as a result of its occurrence or feared occurrence elsewhere."

What we take that to mean is that it can't be said that the loss-causing measures would not have happened had there been no occurrence of COVID-19 within the specified policy area, as those measures were taken as a result of the occurrence, or feared occurrence, of the disease elsewhere.

Now, the next paragraph, is paragraph 100 and this is a paragraph with which my clients agree, where the court says, at page 66 {C/3/66}:

"While much of the argument was understandably put in terms of the nature of the causal requirements, we consider that what underlies the dispute in relation to

the causative requirements is a difference as to the nature of the peril insured and this depends upon a proper construction of the relevant terms of ..."

Then it refers to the extension clause in another policy, the disease clause:

"Once that question of construction is answered, it seems to us that the issues of causation will also largely have been answered and in particular it will have been established which matters can be said to be separate non-insured causes which could be seen as distinct from the insured peril."

My Lord, we respectfully agree with that. Once the insured peril is correctly identified, and that is purely a matter of policy construction, causation largely answers itself and once you have identified the insured peril, you know what it is that has to be removed or reversed out for the purpose of the hypothesis demanded by the policy disease trends clauses.

The next paragraph is paragraph 110 at page 69 {C/3/69}, where the court says:

"If we are correct in our view as to the nature of the cover provided [in the relevant disease clause, not mine] then the issues as to causation largely answer themselves. If properly construed there is cover for

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

In relation to the trends clauses, this is clearly set out at paragraph 532 at page 179 of the same file {C/3/179}.

As I say, this is in relation to trends:

"Similarly, in relation to the disease clauses we, have concluded that there is cover in principle -- where we have concluded that there is cover in principle, we have done so because we consider that on the correct construction of these wordings, they insure the effects of COVID-19 both within the particular radius and outside it, the whole of the disease, both inside and outside the relevant area, has to be stripped out in the counterfactual."

My Lords, there we are. The court concluded that the insured peril was the disease at large and the measures taken in respect to it.

The last paragraph, before I turn to my wording, is paragraph 540 at page 180 of the file {C/3/180}. At paragraph 539, the court has addressed the types of proof which in principle will be available for demonstrating the existence of a case of COVID-19 within a relevant policy area at a given date. Then at 540, they say this:

"The hearing proceeded accordingly and no expert evidence was heard on the question of prevalence. The court is therefore not in a position to make any findings of fact about the actual prevalence of the disease at particular dates or in particular locations."

My Lords, against that background, can I now turn to my policy wording which is also -- this is QBE1 in file C, at page 715 and for those following in paper documents, that's tab 12 {C/12/715}. If I can start at page 716, the contents page {C/12/716}, your Lordships will see that this policy is a composite policy which covers a miscellany of different risks and the sections to which I will turn are firstly the core section, section 4, which is the property section and after that, the section of central relevance, business interruption,

which is section 7.

Before coming to that, I should say that QBE insures policyholders that fall into six out of the seven categories helpfully identified by the court at paragraph 53 of its judgment. Perhaps we needn't come to this, but for your Lordship's note at file C, page 1951 and following, there's a very helpful schedule which tells you what category of clients is insured by any given policy under consideration.

But all I'd like to say at this stage is that while QBE does cover many cases where policyholders are resident in London and major English cities, it also covers policyholders situated in other parts of the UK, some of them remote parts. For example, QBE has a number of policyholders in the Highlands of Scotland benefiting from disease clauses. It has nine in the Orkney Islands, it has one in the Isles of Scilly and it covers insureds in Northern Ireland in Armagh and Omagh and in some of the more remote parts of Wales as well as the major metropolises. I'll come back to the significance of that briefly and in due course.

Now, if we go to page 724 of bundle C {C/12/724}, the court will see the property section and this gives cover for physical damage to insured property and it's to be assessed —— the loss is to be assessed —— in

accordance with the basis of claim provisions and you'll see that the cover works in relation to accidental damage to property insured.

Now, "accidental" and "damage" are both defined terms. I'll give you the references to save going to them. The former, "accidental", is at page 804 and it means, not surprisingly, a single and unexpected event. The latter, "damage", means physical damage to tangible property and you'll find that definition at page 807 {C/12/807}.

You'll also see here reference to territorial limits and the territorial limits for the property section and indeed for the business interruption section, before we come to the relevant sub—limits, are the United Kingdom generally, and that you'll see at clause 23.110 at page 817 {C/12/817}. Unless the court feels it wants to look at those definitions, I won't spend time going to them.

Accidental damage to the property insured is covered provided that:

Damage occurs during the period of insurance within the territorial limits and from a cause not excluded in the property—related exclusions.

Now, against that background, can I come to section 7, which is the section we're centrally

concerned with, at page 741 {C/12/741} which is the business interruption section, and the court will see at 7.1.1 that the core cover for business interruption is business interruption resulting directly from damage as defined to property. Damage has been defined as physical damage to tangible property. Cover is provided to the resulting business interruption provided that, at the time the damage occurs, there's in force either cover under the property section of this policy or, and I am paraphrasing, a roughly equivalent property cover under a different policy. Then, at (b):

"At the time the damage occurs you have claimed under the policy referred to in (a) above and the relevant insurer has either paid such claim or admitted liability or would have paid it but for the operation of some deductible or excess."

Now, there then follows at 7.1.2 {C/12/741} basis of settlement provisions which your Lordships will see are applicable to the entire business interruption section, and we needn't, at least for my purposes, flog through these clauses. They are typical of this insurance. They quantify business interruption loss by reference to a number of defined parameters, the relevant ones of which are trend adjusted and the insured has a choice either to claim loss of insurable gross profit, which,

in 7.1.2(a) means reduction:

"... in respect of reduction in turnover: the sum produced by applying the rate of gross profit to the amount by which the turnover during the indemnity period will, in consequence of the damage, fall short of the standard turnover ..." which is a trend adjusted defined term.

Again at 7.1.4 {C/12/742}, your Lordships will see another option which is to claim reduction in gross revenue and again it works by reference to a fairly similar formula, with standard gross revenue being a defined trend adjusted term.

Then, although I don't want to spend time on it because I am adopting the submissions of others, for your Lordships' note, at page 817 {C/12/817} —— perhaps we ought to go there, actually. Sorry, it's 819 {C/12/819}, my mistake. I apologise, you'll see the trend clause under the rubric "Trend adjusted", it's at 23.117:

"'Trend adjusted' means adjustments will be made to figures as may be necessary to provide for the trend of the business and for variations in or circumstances affecting the business either before or after the damage or which would have affected the business had the damage not occurred, so that the figures thus adjusted will

represent as nearly as may be reasonably practicable the results which but for the damage would have been obtained during the relative period after the damage."

Although that trends clause works by reference to damage as defined, which your Lordships know is physical damage, the court found —— and it's common ground before this court —— that it applies across the board to business interruption caused by perils which are not physical damage. The necessary tweak, if I can put it like that, to the wording being to substitute the insured peril for the word "damage" when it appears.

Can I now come to page 743 {C/12/743} of file C, where we see the extensions applicable to the business interruption section, one of which, 7.3.9, and I'll come to that presently, is the disease clause which is central to my appeal. But the stem wording at 7.3 says:

"We will indemnify you for ..."

I'll come back to that. It may be relevant to an issue in due course.

There are three clauses that I'd like to point out, if I may, en route to the disease clause. Each of these clauses has a specific geographical sub—limit which circumscribes the insured peril and limits the risk.

The first is a denial of access clause at 7.3.4

{C/12/44} which covers:

"loss resulting from interruption of or interference with the business as covered by this section [and here are the words] caused by damage by any cause not excluded by this policy to property within ... 250 metres of the perimeter of the premises which physically prevents or hinders the use of the premises or access thereto ..."

What we say about that and similar clauses is that the specific limits on the territorial scope of the risk is intrinsic to the definition of the insured peril. It's only damage within that very narrow confine which is relevant when you come to ask whether that damage has caused the relevant interference with the business or led to the relevant restriction.

The second immediately follows it, it is 7.3.5, it is "Denial of access non—damage", and this covers:

"Loss resulting from interference with the business caused by action by the police authority following danger or disturbance within 250 metres of the premises which shall prevent or hinder use of the premises or access thereto."

Now, a very similar form of wording, namely "danger or disturbance within the vicinity of the premises", was the subject of a decision in the court below and may I,

by analogy, show your Lordships where that is to be found. Paragraph 436, it's a number of places, but paragraph 436 {C/3/155} of the judgment at 155 of this file and this is one of Amlin's clauses. An AOCA is "action of competent authority" and you'll see from the second line of that paragraph that what was in issue were the words:

"... following a danger or disturbance in the vicinity of the premises."

I needn't read out that paragraph, but the court found that that connoted incidence within a very narrow compass, in other words local to the premises, such as a bomb scare or a gas leak. And similar findings, for your Lordships' notes, are to be found in relation to the same language, albeit in relation to different policies, at paragraph 466 {C/3/162} and 499 {C/3/169}.

Just returning, if I may, to my clause, the inference from the wording used and, indeed, from the court below's conclusion on similar wording, is that following danger or disturbance within 250 metres connotes incidents proximate or local to the premises and it must be such incidence that caused the relevant loss.

The final such clause which operates by reference to its own specific geographical limits is 7.3.7 {HL/13/8}

under the rubric "Loss of attraction", that's 7.4.4. The court will see that that covers:

"Loss ... in consequence of diminution of attraction to the premises following damage by any cause not excluded by this policy to property occurring at any other site within a one mile radius of any of the premises ..."

We say that in all three of those clauses the special geographical limits circumscribe the risk and are an intrinsic definition of the insured peril.

My Lord, against that background, can I now focus on 7.3.9, which is the disease clause under consideration in QBE's appeal. I read back from the stem wording at 7.3 that says:

"We will indemnify you for interruption of or interference with the business arising from ..."

There are then five perils of which (a) is the relevant one:

"any human infectious or human contagious disease (excluding ... AIDS or an AIDS related condition), an outbreak of which the local authority has stipulated shall be notified to them manifested by any person whilst in the premises or within a 25 mile radius of it.

"b) actual or suspected murder, suicide or sexual assault at the premises;

"c) injury or illness sustained by any person arising from or traceable to foreign or injurious matter in food or drink provided in the premises;

"d) vermin or pests in the premises;

"e) the closing of the whole or part of the premises by order of a competent public authority consequent upon defect in the drains or other sanitary arrangements at the premises."

And then:

"The insurance by this clause shall only apply for the period beginning with the occurrence of the loss and ending not later than three months thereafter during which the results of the business shall be affected in consequence of the damage."

My Lords, I make the following points in relation to that clause.

First, the stem wording, which you've seen at clause 7.3 {HL/13/7}, tells you this is not in terms an indemnity for loss resulting from business interruption, it is cover for business interruption arising from the perils described. That means that the perils described by the words that follow must be the proximate cause of the business interruption.

Now, the court may well be asking: why does it

matter whether business interruption is characterised as part of the peril or the loss which in turn is then quantified by the settlement provisions to which I've referred? To my clause I'm going to submit it doesn't matter at all for reasons I will explain, but the reason flows from the wording of section 55 of the Marine Insurance Act which, as the court will know, says that:

"Unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against."

We needn't go to it, but the MIA is at {E/6/94} and what appears to have been suggested is that if business interruption is a component of a peril, then proximate cause only has to be established between the business interruption and the loss, as distinct from business interruption and the damage causing components of the peril.

That's, as I understand it, the potential relevance of the wording, but actually it doesn't matter for my clause, because my clause covers interruption or interference with the business arising from the peril which follows and it's not, I think, disputed that the

expression "arising from" connotes the relationship of proximate cause between that which immediately precedes it and that which follows.

I don't think the FCA disputes that this is the usual significance of the expression. For your Lordships' notes, at paragraph 362 of their respondents case, which can be found, we needn't go to it, at {B/10/443} and in any event, it's supported by authority, the most well known of which is Coxe v Employers' Liability Assurance, a judgment of Mr Justice Scrutton, which the court will find at file {F/19/314} for those that need it.

I will assume at the moment that it is common ground that the words "arising from" connote the nexus of proximate cause between the interruption of or interference with the business, in other words, the words that precede it, and the perils which immediately follow it. So that expression is a pointer to the proximate cause as regards each of those perils. I should also say, for completeness, that in two of the four policies comprising QBE1, the words "caused by" replace "arising from". In my submission, they're synonymous. Those policies are at {C/22.1/1566} and {C/22.2/1643} respectively. We needn't go to them.

There then follows the description of the

insured peril and there are two clauses that refer back to the noun "disease" and these two clauses perform very different roles. The first is purely descriptive. It tells the reader what type of disease qualifies for cover, namely, when an outbreak of which the local authority has stipulated shall be notified to them. In effect, it's an internal definition of notifiable disease.

The second qualifying clause, however, performs a very different role. These are the words: "Manifested by any person whilst in the premises or within a 25−mile radius of it".

This clause tells you what has happened to the disease, how it must have behaved in order to disclose the insured contingency. It must have been manifested by any person whilst in the premises or within a 25−mile radius of it. "Manifested by any person whilst in the premises," does not supplement the description of the disease. It doesn't add a qualifying characteristic to a disease. It tells you how the disease has acted. It describes a contingency in the nature of an event, and it is that event from which the business interruption must, as a matter of express wording, it is that contingency from which the business interruption must arise.

Now, the past participle of the word "to manifest" has been used by the draftsman, but the same meaning could just as easily have been expressed by use of the present participle, ie a notifiable disease manifesting itself in any person, and although it doesn't concern me, your Lordships will see an example of that at paragraph 285 of the judgment {C/3/116}. It's one of RSA's policies, page 116, which covers loss as a result of paragraph 285:

"Closure or restrictions placed on the premises as a result of a notifiable human disease manifesting itself at the premises."

It doesn't matter which tense you use, but what that is describing is something in the nature of a contingency and it's the contingency from which, as a matter of express wording, the business interruption must arise.

Now, in some disease clauses, for example QBE2 and QBE3, to which we can come later, an occurrence of disease at the premises is covered separately from an occurrence within a radius of 25 miles of the premises. They are treated as separate perils. In fact, perhaps we had better look at an example of this so I can make the point. It's at page 97 of the C file {C/3/97} and you'll see in paragraph 208, that's QBE2,

which covers:

"Loss resulting from interruption of or interference with the business in consequence of any of the following events ..."

And (a) is:

"Any occurrence of a notifiable disease at the premises or attributable to food or drink supplied from the premises ..."

And (c) is:

"any occurrence of a notifiable disease within a radius of 25 miles of the premises ..."

And there are other examples.

Now, as I understand it, although this is not an observation made by the FCA in relation to QBE2 but similar clauses, the FCA seems to accept as regards other disease clauses that in the case of stand−alone cover for a notifiable disease occurring in the premises or attributable to food or drink supplied from the premises, an event at the premises has to be the cause of the loss. In other words, that must be the causative insured peril. For your Lordships' note, that's paragraph 194 of the respondent FCA's case at {B/10/394}.

Now, we submit that that is obviously correct, but we also submit that if it's right, there is no reason

why cover for an occurrence or manifestation of disease within 25 miles of the premises should not also circumscribe the insured peril from which the BI must arise. It's a different geographical limit, but it has the same role in circumscribing the territorial scope of cover. All that has happened in QBE1 is that the two separate perils have been elided for the purpose of constituting peril A.

My Lords, the next point is this. For a disease to become manifest, it has to have been demonstrated either by diagnosis or the showing of symptoms. An occurrence of a disease which is unobservable or asymptomatic cannot qualify. This is common ground and the court's finding on that is paragraph 225 of the judgment {C/3/102}. We needn't look at it, it's common ground.

Now, that's an important distinction because the manifestation of the disease by a person is an event in the sense in which that word is commonly used in an insurance context. That is to say, it is something observable which happens at a particular time, in a particular place, in a particular way, and is not too remote from the cause of loss.

It's to be distinguished in an insurance context from the remoter causes from that and other events may have originated and in making that distinction, we refer

in our written case −− and I needn't traverse it here −− to the familiar authorities cited at paragraph 74 to 77 of QBE's appellants case, and that's at {B/8/277}.

So once the proximate cause, the relevant contingency, has been identified, you do not search for its remoter origins. The remoter originating cause of an insured contingency is irrelevant. The authorities in question are the well−known cases of Axa v Field, Becker Gray v London Assurance and Everett v London Assurance, and your Lordships will find them at those paragraphs.

Accordingly, we say, the event from which the business interruption must arise is the manifestation of the notifiable disease by someone whilst in the premises or within 25 miles of it. The area limited by the radius operates as a geographical sub−limit specific to this risk. It imposes an explicit limit on the scope of the insured peril. In this respect, the radius provision operates similarly to any other territorial limits imposed by a policy and your Lordships have heard that the prima facie limit for business interruption, territorial limit, is the UK.

Now, my Lord, that we respectfully submit, is the reading −− the natural reading −− of 7.3.9 simply taken on its own, but in its contractual setting, that

interpretation is emphasised, because —— and I needn't labour this —— the court will see that perils (b), (c), (d) and (e) are also perils, I should say, which refer to events at the premises or attributable to something happening at the premises, namely the provision of food or drink.

My Lords, can I now deal with the wider matrix. I've dealt with the clause in its contractual setting, at least I hope I have, and I want to make four points here because the wider matrix is something on which great emphasis is placed by Mr Edelman's clients.

The first point is this, I apologise if they seem obvious, but I submit they need to be emphasised in the current context.

Firstly, it's only information reasonably available to the parties at the time of contracting that is to be attributed to their proxy, the notional reasonable man. We say, for example, that it's reasonable to impute to the broker and underwriters negotiating composite cover of this sort the broad knowledge of public health powers of which the average, well-informed citizen will be generally aware. This would include, in serious cases, a power to confine or quarantine infectious individuals, or close perhaps specific premises, possibly even a locality.

It's not, however, reasonable to impute to parties negotiating composite cover of this sort the detailed potential implications public health law outlined at length in the FCA's respondent's case and most of us, I would venture to submit, would have been unaware of those powers before we came to look at this case. So that's point 1.

Point 2, we submit, is important. In the vast majority of instances of notifiable disease, the radius clause would operate without undue difficulty to protect an insured business. Before COVID-19 was listed as a notifiable disease, 31 diseases were notifiable under the relevant Health Protection (Notification) Regulations 2010, and I wonder if the court would like to look at those. It's in file E, page 88 is the relevant list of diseases, tab 5 for those who need it {E/5/88}.

What the court will see here —— and there's quite a long list —— you will see cholera, food poisoning, legionnaires' disease, measles, mumps, rubella, SARS —— and I'll come to that individually —— tetanus and typhus. You will see quite a few diseases which, if they manifest themselves, are likely to affect a locality, maybe a wide locality, but that would likely be their impact. For example, an outbreak of measles

may lead to closure of a school or college or ——

MR EDELMAN: I'm sorry to interrupt, Mr Crane, but there was a ruling by the court below, and of course Mr Crane wasn't involved in the court below, about the incidence of these diseases because there was a point being raised on an Ecclesiastical policy and the court found against the FCA's application to adduce evidence on the potential spread of these diseases, so that was ruled out.

MR CRANE: Sorry, I'm not quite sure where the direction of that interruption goes, but it's taken a valuable minute off my time, but perhaps I can go on.

I don't think anything in the court below ——

LORD REED: Do carry on for the moment, Mr Crane, and then we can hear Mr Edelman in reply if there is an objection to this line of argument.

MR CRANE: Very well, my Lord. Can I just say, for example, obviously Legionnaires disease might lead to the closure of one or more group of premises, but I will leave it there.

The converse of this point is that the fact that there are difficulties in applying this clause to the wholly unforeseeable circumstances of this case does not mean that the cover is illusory, a word that you will come across frequently in the respondents' submissions.

A year ago, it was utterly inconceivable that the UK and devolved governments will close down almost the entire national economy and confine healthy citizens to their homes to prevent further transmission of a disease.

It was inconceivable that such measures would be taken indiscriminately in the sense of nationally throughout the UK, irrespective of the prevalence of disease in any given locality.

Now, point 3 is that it's not suggested by QBE that an epidemic as such was unforeseeable, as distinct from the extraordinary measures taken in response in this case to the pandemic. As the FCA has pointed out, SARS was one of the notifiable diseases and a disease such as SARS might well have had unpredictable patterns of transmission and become widespread.

A number of points flow from that. First, it's a fallacy to assume from the fact that a particular risk may have been foreseen as a possibility at the time of contract that the parties agreed to cover it, or, more relevantly, to cover it without relevant limits. The fact that a contingency may have been foreseeable does not mean that the underwriter agreed to cover that contingency without limits or that the policyholder was willing to pay for such cover.

The question whether a given contingency is covered is answered not by asking whether it was reasonably foreseeable to the parties, but by a reading of the insurance clause.

Now, the proper inference, the next point, is that the proper inference here is that in the face of the risk of a disease occurring with unpredictable patterns of spread, there was no agreement to insure the effects of such a disease at large. On the contrary, we submit, in the face of such a risk, the parties stipulated for a radius clause. That is to say, for an agreement to cover the impact on an insured business of any such disease manifesting itself within a territorially limited area.

Point four that I would like to make on the wider matrix is this: where circumstances have occurred which were inconceivable when contracting, as I say, it's not the epidemic as such, it's the measures in response, it is tempting to interpret a contract with hindsight so as to make it fit what may seem to be the merits as they now appear.

Now, I hope the court will forgive me if I refer in this context to a well-known dictum of Sir Thomas Bingham when he was Master of the Rolls in the case of Philips Electronique v BSkyB, which the

court will find in file G at page 1556, tab 77 for those that need it {G/77/1556}. Now, this, I should make it clear, was a case about the implication of implied terms and the court, I'm sure, will be familiar with it. One has to treat the observation to which I'm going to refer in that context. It is found at page 1556 and it's just after the first paragraph break where the Master of the Rolls said this:

"The question of whether a term should be implied and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight and it's tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting but wrong."

Now, your Lordships will see on the previous page, 155, central paragraph, the context for this, which is that the process of implying a term is rather more ambitious than construing a contract, and I want the court to have that context.

It remains relevant because here we're facing the same temptation, we're construing a clause with hindsight in the aftermath or indeed during a crisis of unprecedented proportions and there is always a temptation to read it in a way which makes it

accommodate the unprecedented facts as they occur. But I have to respectfully submit that that is a wrong approach.

My Lords, on radius clauses, before I leave them, the court will have had the core of my submissions when I was going through my clause, but can I just make five points in relation to radius clauses before I leave them.

The first is this, there's no reason why a radius clause should be the treated any differently from any other geographical limit on the risk. The scope of insurance cover, we submit, is habitually circumscribed by vertical and horizontal limits and where geographical limits are placed on a risk, the inevitable inference is that instances of the risk occurring outside the geographical area are not covered.

That's point 1.

For example, one can illustrate this under the property material damage section of this policy where the territorial limits are the United Kingdom. That section of the policy would not respond to property damage caused outside the United Kingdom. That would seem obvious, but we say it's just as obvious when you have a sub-limit in the shape of a radius clause.

The second point is this, geographical limits are

simply one method by which insurers limit the potential for accumulation of loss across their book of business. It's a crude tool, but it is, nevertheless, there for that reason.

The third is this. There is no logic, we submit, in the proposition that because the area within the specified circumference is extensive, it is to be inferred that the parties intended to cover the impact of cases outside that area. The fact that the territorial limits on a risk are generously drawn, in fact the relevant area is nearly 2,000 square miles within a radius of 25 miles from a fixed point, the fact that those limits are generously drawn does not mean they can be disregarded. Thus, a one-mile, a five-mile or a ten-mile radius would reduce the underwriters' exposure, but its effect in circumscribing the risk would, in principle, be the same.

The next point is important from QBE's point of view. It's a fallacy to view their case as contending for an exclusion of cover if notifiable disease is manifested outside the specified area.

Such instances are merely not covered and in each case the question is whether the manifestation of disease within the specified area is a proximate cause of the business interference. I need no help in

"but for" causation, in my submission, I should say that.

Take a case, the fifth point, where a notifiable disease manifests itself both inside a specified area and outside it. In such a case, a judgment has to be made as to whether the appearance or manifestation of a disease within the perimeter was the efficient or dominant cause of loss. This is a question of fact in each case. If, for example, there is a cluster of cases within the radius but relatively few outside, the inference might well be drawn that measures taken in response were in response to disease within the insured area.

Lord Leggatt.

LORD LEGGATT: You said the efficient or dominant cause of loss, Mr Crane. I just wanted to pick you up on that.

MR CRANE: Yes.

LORD LEGGATT: It is well established nowadays, isn't it, that there can be multiple causes of loss; we're not limited to finding the dominant cause?

MR CRANE: That's correct, my Lord. Well, I'm going to deal with that in a second, but I'm going to come back to it in relation to the court's view on causation.

In a case where there is disease manifested both inside and outside the relevant area, one has to ask ——

has to make a judgment as to whether the causes, or the manifestation of the disease, within the relevant perimeter were the effective cause of loss in the sense that the business interruption arose from those cases.

Now ——

LORD LEGGATT: Well, was there an effective cause of loss, then?

MR CRANE: Yes, indeed, an effective cause of loss.

LORD LEGGATT: Even if the occurrence outside the zone was another effective cause of loss?

MR CRANE: Yes, yes, I accept that, but we'll see on the facts of this case that the relevant measures —— there's no evidence that the relevant measures, the government measures, which caused the business interruption, either from 16 March or 23 March or the 26th were measures in response to the manifestation of disease at any given locality.

One has to ask in cases where there is disease both within and without the relevant insured perimeter what are the respective contributions of those cases to the business interruption of the insured premises in question.

So I accept, indeed it is part of my submission, that when cases occur both inside and outside the relevant perimeter, it will be necessary to assess the

respective efficiency as a cause of loss of the covered and non—covered causes.

Now, can I now turn to the Divisional Court's construction. The Divisional Court opted for a construction that removed any causative relevance from a manifestation of disease within the specified area. That's my core complaint, respectfully made.

It concluded that the insured peril was the notifiable disease at large and that cover under the QBE1 disease clause was triggered if and when there was a single manifestation of disease within the defined area. This interpretation is most starkly illustrated by the Divisional Court's declaration in relation to QBE which the court will find at page 20 of file C, behind tab 1 for those that need it {C/1/20}.

24.3 is the relevant declaration and it says this:

"If COVID—19 was manifested at or within a 25—mile radius of the insured business, as to which see declaration 7 [which, by the way, just tells us the meaning of 'manifested'] there would be cover under the disease clause in QBE1 from the date COVID—19 was manifested in the 25—mile radius, the losses caused by interruption of or interference with the insured businesses caused by COVID."

Then it refers to various measures pleaded by the

Financial Conduct Authority. Then, under (i), and this is important:

"It is not necessary for the interruption of or interference with the insured business to have been caused by the manifestation of COVID—19 within the 25—mile radius as distinct from its manifestation outside the radius ..."

And (ii):

"The correct counterfactual is as set out in declaration 11."

Thus, for the court's note, that deals with the trends clause and, of course, once you've identified the insured peril as a disease generally and measures taken generally with regard to it, you extract that in constructing the hypothesis required by the trends clause.

This means, and I will just take —— this is pure hypothesis, this means, for example, that in remote areas of the United Kingdom, such as, for example, the Highlands, the Orkneys, remoter parts of Northern Ireland or the Isles of Scilly, is an example that's been taken before, it's immaterial in such areas whether the lockdown and the consequent interference with local businesses preceded the first recorded case of COVID—19 or not. On the court's construction, it simply doesn't

matter whether the first local manifestation precedes or follows the measures that caused the damage.

Where the first local case follows, the fiction —— and this is advanced by the FCA in their respondent's case —— is that somehow that local case operates as a concurrent cause of the continuing loss to which we say that cannot be correct. It's a fiction. The cause of loss is government measures which, on this hypothesis, have already had and continue to have their impact.

In short, what on a natural reading, in my submission, is the insured event becomes, on the court's interpretation, a mere proviso to cover. The radius provision becomes a tick—box covering sets when someone with symptoms strays into the specified area presumably with the insured being oblivious to that fact and for the fact that its loss has now become recoverable and the indemnity period, which dates from the date of loss, has now incepted.

Now, my Lords, against that reasoning, can I come to the one paragraph in the judgment in which the court deals with this clause or with this interpretation.

That's paragraph 226 {C/3/102} at page 102. For the court's note you'll see in 224 that there is a conclusion on the meaning of "manifested" with which

we respectfully agree and at 226 we have the court's reasoning:

"Focusing on the language and structure of Clause 7.3.9, we consider that within the insured peril the required causal link ("arising from") is between the interruption or interference with the business on the one hand and the notifiable disease on the other, provided has been "manifested" by a person within the 25—mile radius. We do not consider that the clause most naturally reads or should be construed as saying that the interference has to result from the particular cases in which the disease has manifested within the 25—mile radius. Instead, the cover is for the effects of a notifiable disease if it has been manifested within the 25—mile radius. This appears to us to be apparent from the juxtaposition of the phrase relating to business interruption without relating to notifiable disease and the fact that the phrase 'manifested by any person whilst in the premises or within a 25—mile radius of it' is most naturally read as an adjectival clause limiting the class of notifiable disease which, if they interfere with the business, will lead to coverage.

Now, my Lords, in my respectful submission, there are three errors in this paragraph.

The first is that the required causal link "arising

from" is not within the insured peril. It's between the business interruption and the insured peril that follows.

Your Lordship has had, I hope, a brief but helpful explanation earlier as to why that might matter because causal relationships within the insured peril don't have to observe the discipline of proximate cause required by section 55 of the Marine Insurance Act as regards the relationship of the peril to the loss.

In my case, while we say that's an error, it's not an error that matters for reasons I've already explained, namely that it's common ground that the words "arising from" usually connote proximate cause, the nexus of proximate cause, and that is the only nexus apparent between the business interruption and the various perils that follow. So it doesn't make any difference.

However, the other two errors, in my respectful submission, do. The second is the court says that the reading that you have just heard is the most natural reading. In other words, the reading which I have offered to the court is not the most natural reading.

Now, I would respectfully submit that one can test that by asking this rhetorical question: if any of us had read this clause a year ago and had been asked what

it had meant and what it covered, in my respectful submission, the result would have been obvious. It's quite clear that this clause intended to cover the effects of a notifiable disease manifesting itself within the premises or the specified area.

The third error, in my submission, is the court's treatment of the relative clause "manifested by any person within the premises or within a 25—mile radius of it". This clause is not a supplement to the description of the disease. That's already been described. It's a clause which tells you albeit succinctly what the disease has done, what has happened to it. In other words, it describes a contingency and it's that contingency which, when one refers back, has to be the cause of the business interruption or loss.

It's easy to say it's adjectival because ultimately it conditions a noun, but actually it's doing a job completely different from the clause.

My Lords, that's my case on construction. Can I just invite the court to see where the court goes on causation and we find that at page 69 of file C, paragraph 111 {C/3/69}. I think we've been there already.

UNIDENTIFIED SPEAKER: No, we haven't.

MR CRANE: Yes, paragraph 111, we can pick it up, I think,

halfway down that paragraph. The first part of the paragraph is dealing with the meaning of the word "following", but the court says this, halfway down 111:

"Even if the word 'following' imports the requirement of proximate cause, we would consider that, given the nature of the cover as we consider it to be, this is to be regarded as satisfied in a case in which there is a national response to the widespread outbreak of a disease. In such a case, we consider that the right way to analyse the matter is that the proximate cause of the business interruption is the notifiable disease of which the individual outbreaks form indivisible parts."

So that is once you have identified the disease at large as the peril, it follows that anything caused by the peril at large, provided it proximately affects the business interruption, is recoverable and, by parity of reasoning, it is removed for the purpose of performing the hypothesis or constructing the hypothesis required by the trends clause, and we should pick up in 112 the alternative view of causation which the court regards as less satisfactory and this really is relevant to Lord Leggatt's question:

"Each of the individual occurrences was a separate but effective cause and on this analysis they were all

equally effective because the authorities acted on a national level."

Now, I needn't say any more about the court's preferred view of causation because it's completely contingent on who's right as to construction, but if I'm right on construction, there is no problem as to causation and we can see that in the way the court dealt with QBE2 and 3 at paragraph 235, page 104 {C/3/104} and the background is the court found for QBE on this wording. They said:

"Given our construction of 3.2.4, the issues as to causation largely answer themselves."

Now, I needn't read that paragraph because the court goes on to say how causation works on that hypothesis.

Yes, Lord Hamblen.

LORD HAMBLEN: Why is that, Mr Crane? If paragraph 112 is right, if each local occurrence is an effective cause of the national measures taken, why isn't the local occurrence a proximate cause?

MR CRANE: Because, my Lord, in relation to 3.2.4 the court has found that the peril is the event constituted by the occurrence of disease within the relevant radius. Ergo, on that hypothesis that that construction is right, it follows that those occurrences have to be proven to be the cause of the relevant business interruption and

elsewhere it's become, in my submission, plain that no cluster or single case of a local occurrence was the cause of the measures which affected businesses throughout the United Kingdom.

LORD HAMBLEN: But if it was a cause, as paragraph 112, why isn't that good enough?

MR CRANE: Well, my Lord, for this reason: paragraph 112 proceeds and the court regards it as less satisfactory on the basis that each case of illness is a separate occurrence and given that that is the case —— and we're not talking about interdependent clauses here, we're talking about independent separate clauses —— what has to be demonstrated on that hypothesis is that the independent cases of illness manifested or occurring within a given radius led to or caused the business interruption in question.

On that basis, one is into cases such as The Miss Jay Jay and Wayne Tank and Pump, which concern interdependent clauses, which these are not, but which are authority for the proposition which again has been accepted by the Financial Conduct Authority that where you have non—covered causes and covered causes, we, the insured, can recover if the covered and non—covered clauses are roughly of equal efficiency. That's accepted as the result of those authorities by the FCA.

I'll give you the paragraph in their case. It's paragraph 347 and it's at tab 10 of bundle B, at 439 {B/10/439}:

"The insured will only recover if the insured and non—insured perils are of roughly equal efficiency as a cause of loss."

That's what's accepted by the FCA, in my submission correctly.

Now, on the hypothesis of this —— on the assumption of this alternative view of causation where each individual case is an independent cause, one has to ask whether the combined effect of those causes within the relevant area is a roughly equal efficiency as a cause of loss as the effect of cases outside the area nationally, which prompted the relevant measures.

The question becomes: were the individual cases within any insured area the efficient or proximate cause of the loss?

My Lord, that's an hour and ten minutes, including one minute that Mr Edelman borrowed from me. Unless your Lordships have any questions with which I can help at this stage, I would give way to the next insurer.

LORD REED: Well, thank you very much, Mr Crane.

I believe we turn next to Mr Simon Salzedo QC on behalf of Argenta.

Submissions by MR SALZEDO

MR SALZEDO: Thank you very much, my Lord. If it's convenient to your Lordships, I will first introduce the Argenta1 wording, then make further submissions on each of my six grounds of appeal in order. As your Lordships know, time is very short for the oral argument, so it is not a mere formality when I say that I also adopt my written case, I adopt the submissions of Mr Crane in relation to disease clauses generally, and that includes his adoption of the submissions of other insurers on certain aspects.

My Lords, the Argenta wording is at {C/5/259} and if we turn to page 261 {C/5/261} you can see the contents page and like Mr Crane's composite QBE1, this also could be called a composite insurance. The main sections are buildings insurance, the fourth line of the contents, and contents insurance. There are then numerous added extras to those property classes, including business interruption insurance section starting at page 55, and in our bundle that's {C/5/314}.

As you can see at the top of the page, 314, the business interruption section is operative only if the contents section is operative. So it never stands alone.

On the next page, 315 {C/5/315} the main

business interruption insurance section:

"If the business at the premises is interrupted as a result of the premises being made uninhabitable by any Damage insurable under the buildings insurance section or the contents insurance section, Argenta will indemnify the insured for the amount of loss as stated in the basis of settlement up to the limits of liability."

Notice, my Lords, that the phrase "business interruption" does not feature in the main BI insuring clause at all other than in the heading. The closest thing in the text is the word "interrupted", which is not a defined term.

What, then, is the structure of the main BI clause? I submit the structure is this: the subject matter of the insurance is the Business of the Premises. That is the thing that may get damaged by a peril. It's the equivalent of the property or the contents insured under the main section.

The policyholder's insurable interest in that subject matter is their entitlement to profits from the Business at the Premises. The type of damage to that subject matter, which this insurance covers, is being interrupted. It's the Business being interrupted which is the equivalent of property being lost or damaged.

The peril which is insured against is the premises being made uninhabitable by Damage insurable under the buildings or contents section. That's the fortuity that might cause damage to the business in the form of interruption.

As you would expect, the clause specifies a causal link between peril and damage with the words "as a result of". The measure of indemnity for interruption damage is defined in the basis of settlement clause. If we look now at the basis of settlement clause at page {C/5/318} again we find that "interruption" and "interrupted" are not mentioned in this clause at all other than in the heading.

The principal measure of indemnified loss in (a) of this clause is the amount by which gross income is reduced due to the Damage and that confirms that the sense of the peril is Damage. The words "due to" express the causal link directly from peril to loss. We don't need to look, I think, at the other two.

Similarly, my Lords, if you go to page {C/5/314}, turning back a couple of pages, and see the definition of "indemnity period", again "interruption" is not mentioned and the indemnity period makes sense only on the basis that Damage is the insured peril.

On the same page, you find the definition of

"standard gross income", which is the Argenta trends clause, and it also makes no reference to interruption and it also treats Damage as the peril which causes the reduction in gross income.

My Lords, the extensions to the BI cover are at page {C/5/316}. The heading at 316 is: "Business interruption insurance section extensions". So this is expressly stated to be a set of extensions to the main cover which I have just shown you.

You can see the extended insuring clause in the top left box on 316, and:

"The company will also indemnify the insured as provided in the insurance of this section for such interruption as a result of ..."

Then the list of extended perils.

The word "also" further confirms that this must be read with the main BI section as an extension of it and so do the words "as provided in the insurance of this section". The term "such interruption" is a reference back to the main BI insuring clause and it means interruption of the business at the premises.

Again, though, the word "interruption" is not here a defined or technical term.

The phrase "indemnify for such interruption" confirms that, as we've seen in the main BI clause, such

interruption is the type of damage for which the insurance provides indemnity.

The words "as a result of", at the end of the insuring clause, are causal words. So one would expect that what follows that phrase will be the insured perils under the extension. As expected, what follows is a list of perils, whose role in the extension section is identical to the role in the main BI section of Damage.

It's common ground among Argenta, the FCA and the Divisional Court judgment that for the purposes of the extensions in the definitions that I've shown you of "basis of settlement" and "standard gross income", where the word "Damage" appears, it means the relevant peril insured, including under the extensions where they are not damage. I add, my Lords, that the same must be true of the indemnity period definition.

It follows, from simply reading the policy with its proper structure, that the only way to make sense of the wording is the analysis that I have been setting out as I've read it, namely that in the main BI section the peril insured is Damage, which makes the premises uninhabitable, and then the extensions, the peril is the content of each of the boxes on the left-hand side on {C/5/316} and {C/5/317}.

My Lords, looking at those boxes now in slightly

more detail, you can see that each is closely focused on the Premises, each in its own different way. So in box one, we have:

"Damage to property in the vicinity which prevents or hinders use or access to the premises."

Box two is:

"Damage to utilities supplying the insured.

Since the damage has to interrupt the business at the premises, in practice that means damage to a utility that supplies the insured's Premises."

Box 3 is similar in relation to other suppliers.

Box 4, going on to page {C/5/317} covers five sub-paragraph perils:

"(a) restriction on the use of the premises by order of public authority consequent upon certain matters, all of which have to occur at the premises.

"(b) any occurrence of [note that phrase] a notifiable disease at the premises or attributable to food and drink supplied from the premises.

"(c) a discovery of an organism at the premises."

I'll come back to (d), which is the important one, in a moment:

"(e) any occurrence of [that phrase again] murder or suicide at the premises."

5, I'll also come back to in a moment.

Then 6:

"Damage to property in the vicinity which deters potential customers."

Then just going back, we have the two provisions which have a 25-mile radius requirement. Extension 5 is:

"Pollution or an oil spill within 25 miles."

Note that the maximum indemnity for that one is a mere £2,500.

4(d) is:

"Any occurrence of notifiable human disease within 25 miles of the premises with a limit of £25,000."

Now, my Lords, every single one of these extended perils will have some underlying cause which could itself be the cause of additional loss to the policyholder. Looking at each type of peril broadly, first, we've got damage to property. Well, that could easily form part of a wider issue. There might be a major flood or a severe weather event.

Secondly, vermin and pests, they never come single spies. I won't quite submit, my Lords, that in London you are never more than 6 feet from a rat, but if you do see a rat or a mouse or a cockroach you can be pretty sure that you are not far from many, many more of them, some of which may be at the premises, some of which may

not be, and there may be a common cause to any given infestation.

Diseases, similarly occur in outbreaks, as the FCA emphasises many times in its case. Even a murder at the premises could be part of a campaign of terrorism which could lead to action by the authorities leading to business interruption, and oil spills have been known to pollute not just 25 miles area, but thousands of miles of coastline length in the worst cases.

My Lords, we accept that essential facts of nature of that kind may be taken to be known by the parties and with that knowledge, the parties to this contract agreed to draw particular lines on the causal chains that might lead from those underlying causes to loss and the lines are the ones set out in the boxes on page 316 and 317 {C/5/316} and {C/5/317}.

Indeed, one could say that that's fundamentally what insured perils are. They're the agreed stopping points on the legal causal chain that must be traced through the complex net of factual issues and factual causes. In any insurance, the insured will normally benefit from drawing that line further back from the loss so as to have more available routes of recovery. The insurer will benefit from drawing that line closer to the loss so that there are less available routes factually of

recovery. That is one of the key matters that any insurance wording will resolve and of course it may well have an impact on the price of the cover because it's a key matter going to the risk.

One further part of the wording to notice on page {C/5/317} in the right-hand box contains the exception exclusions to box number 4 and section exclusion (iii) is:

"For any loss arising from those premises that are not directly affected by the occurrence, discovery or accident."

What I draw attention to in that exclusion is the phrase "the occurrence, discovery or accident" which words are strongly redolent of specific and discrete events of the sort listed in box 4.

My Lords, just stopping to take the words literally at this stage, what extension of 4(d) actually says is that there is an indemnity for interruption to the business at the premises as a result of any occurrence of a notifiable disease within 25 miles of the premises. This is, therefore, cover for damage, the form of which is interruption to the Business at the Premises, only when caused by the peril or fortuity of any occurrence of a notifiable disease within 25 miles of the premises. That's what it actually says.

My Lords, the bulk of the business interruption losses with which this case is concerned were immediately caused by government or public responses to COVID-19. The underlying cause was the pandemic itself. As Mr Crane showed you, the judgment at paragraph 81, which if you want to look at it again is {C/3/57} points out that the question that arises on disease clauses is whether there is cover in respect of a pandemic where it cannot be said that the key matters which led to business interruption, and in particular the governmental measures, would not have happened even without the occurrence of COVID-19 within the specified radius.

That is the question. There is some attempt by the FCA perhaps to suggest differently on this appeal, but, my Lords, if an individual insured can prove that their losses were caused by occurrences within the radius, then Argenta has never denied cover. That's never been part of the dispute between Argenta and its policyholders. This test case concerns whether or not that is one of the things that has to be proved. The effect of the judgment is that that is one of the things that does not have to be proved.

The central question on Argenta's appeal is whether there is cover under extension 4(d) in a case where the

insured peril, as defined in section 4(d), does not feature on the causal chain leading to the relevant losses, and Argenta submits that once one reads the policy and identifies the question, with all respect to the court below, it is obvious that there can be no such cover.

My Lords, my six grounds.

Ground 1 is the identification of the peril and what counts as damage and loss, and I obviously in a sense made submissions about this as I've shown you the policy.

Ground 1 is that the court below was wrong to identify the relevant peril in Argenta1 as being a composite of business interruption at the premises as a result of extension 4(d). That's to say bringing business interruption into the peril itself.

At the trial, the precise identification of the peril in Argenta1 as being any occurrence of a notifiable disease within 25 miles of the premises was common ground. Argenta pointed that out in writing and orally and was never questioned or contradicted on it. The court overrode that common ground without acknowledgement or explanation. Even on this appeal, my Lords, it remains common ground that the words "as a result of" denote proximate causation in Argenta1 and

I'll come back to show you that shortly.

On our view of the peril, those words at page {C/5/316} appear between the peril and the damage, which is exactly what you would expect. But on the Divisional Court's analysis and the FCA's case, they are an anomaly. Our analysis is also consistent with the fact that the wording does not state any causal connection between such interruption and loss.

My Lords, the FCA notes this point in its respondent's written case at {B/10/403}. If I could just ask your Lordships to look at that, at paragraph 224.2. At 224.2, your Lordships see the FCA write:

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

So the FCA is driven to argue that the lack of any causal link most likely imports proximate cause. In our submission, that involves strain and artificiality. The natural construction of the words used at {C/5/316} is that the indemnity is for the damage which is constituted by such interruption of the Business. That

construction does not invoke causation at all, which is consistent with the absence of causal wording between those two matters.

I also refer my Lords on this point to our written case at {B/5/124} at paragraphs 27 to 28 where your Lordships may recall that we have referred to some authorities showing the way that "peril" has always been understood in insurance law, including of course section 55, which Mr Crane has already read to my Lords and we spell out at paragraph 28 the analogy between other forms of more basic insurance, if you like, and business interruption cover.

My Lords, what we say about this is also entirely consistent with the history of business interruption cover which the FCA has set out in its written case at {B/10/361}. Your Lordships may recall that at paragraphs 93 to 95 the FCA set out that the origin of business interruption cover was to permit the recovery of consequential losses from property damage. There had been authorities saying that that was not covered and indeed in Argenta it's expressly stated that consequential loss is not covered. That's at page {C/5/353}. We don't need to go to it.

In other words, business interruption started not as a peril but as a form of damage involving consequential

loss which was not recoverable in the property section. It was made recoverable by making Damage into a peril which was then insured against under the business interruption section.

The later addition, historically later, of non−damage extensions didn't change the analysis, all it meant was that damage in the form of business interruption was indemnified if it was caused either by the originally defined peril Damage or one of the new non−damage extended perils. My Lords, on this issue of what counts as the peril, the judgment contains no reasoning, only conclusions, so there's nothing for me to take you to in the judgment.

The weak support given to the judgment by the FCA's respondent's written case at {B/10/401}, paragraph 218 where they talk about the provisions of some policies that may have a causal link between business interruption and loss, that of course does not apply to Argenta at all. The points that are made against Argenta are at paragraphs 219 and 220 {B/10/401}. I'm not going to take time now, but when your Lordships remind yourselves of paragraph 219 and 220, you'll see that they are purely to the effect that the issue does not ultimately matter.

As to whether the issue doesn't matter,

your Lordships were shown by Mr Crane paragraph 100 of the judgment, which shows that the Divisional Court certainly thought that it mattered, indeed thought that it was critical, so it clearly did matter to their decision, even if it should not have done.

So, my Lords, ground 1 of our appeal should succeed because the words of Argenta1 correspond precisely to the orthodox analysis we have set out. There's no reasoning before your Lordships from the court below to suggest a contrary answer and there's no reasoning from the FCA either that could support any different result. My Lords, we say ground 1 should succeed.

My second ground is that the court wrongly concluded that the words "as a result of" in Argenta's business interruption extension did not require proximate cause.

Now, my Lords, in the introductory part of the respondent's written case at {B/10/346}, paragraph 31, the FCA appears to adopt the view that we criticise on this point, but in the light of what I'm about to say, it seems that what they say there is not intended to apply to Argenta. None of the individual judgment paragraphs they cite at 31 relate directly to Argenta.

Later in the written case, when the FCA deals with Argenta specifically, at {B/10/401}, where we were just

before, at paragraph 219, which I was referring to on a slightly different point a moment ago, they say that, if you look at paragraph 219 going over onto page 402 {B/10/401}, the FCA says:

"We have misunderstood the judgment on this point."

They say that where the term is "resulting from" the FCA accepts this requires a proximate cause test. They say there is no dispute on this point and Argenta is aiming at the wrong target.

My Lords, I assume that when they say "resulting from" they mean "as a result of", which are Argenta's words, and the point is also made explicitly in relation to Argenta again in the FCA case at {B/10/443}, paragraphs 361 to 362. So it seems from those paragraphs as if it is expressly and clearly common ground on this appeal that the words "as a result of" mean "proximately caused by".

Now, my Lords, I maintain my submission that the Divisional Court got this point wrong as well, for all the reasons given in our written case at paragraphs 42 to 46, but given the time constraints, I will assume that your Lordships will accept what is put before them as common ground on this appeal and I will not spend further time on it.

But, my Lords, whether because we are right to

criticise the judge below —— the judges below —— in ground 2 or whether because it's now common ground, in either event your Lordships should hold that "as a result of" in the Argenta wording are words of proximate causation.

On that basis, it follows that what Argenta1 actually says is: one, it indemnifies for; two, business interruption; three, proximately caused by; four, any occurrence of a notifiable disease within a radius of 25 miles of the premises.

As the court below acknowledged at paragraph 81, which, as I say, you've seen before, it has not been shown in this test case that occurrences within the radius of any particular Argenta policyholder caused the governmental measures which caused most of their losses. That's enough to establish that it has not been shown that the actual words of Argenta1 are satisfied by the generality of claims for COVID-19 losses.

The remaining question is whether there's any basis to read the policy as meaning something different from what it actually says; and that takes me to ground 3.

Ground 3, my Lords, is that the court wrongly distinguished Argenta1 from QBE2 and 3 which it had found were not triggered by most COVID clauses. Like ground 1, ground 3 of our appeal relates to a point that

was not argued at trial. Nobody suggested that the points that the court found made QBE2 and 3 different were relevant points, so we never had the opportunity to address this either as well as to address ground 1.

The court was of course right to hold that QBE2 and 3 did not provide cover, but it was wrong to distinguish Argenta1 from them.

My Lords, if you go to {C/13/852}, you can see the operative words of QBE2 at paragraph 3.2.4(c) and they are:

"Loss resulting from interruption or interference with the business in consequence of any of the following events:

"(c) any occurrence of a notifiable disease within a radius of 25 miles of the premises."

Now, at first sight that's rather similar to the clause I've been showing you at some length in Argenta. What's the difference? The answer is given in the judgment at {C/3/103}, at paragraphs 231 and 232, and the judges below found two differences.

At paragraph 231, which I think you have seen already, the point that is being made is that the words "the following events" in the stem at 3.2.4 of QBE2 show that what's insured under (a) to (f) are matters occurring at a particular time in a particular place and

in a particular way, and that relates to the Axa Reinsurance authority about the meaning of the word "event". In particular, what their Lordships say in the last eight lines of paragraph 231 is this, they say:

"Given the reference to events and taken with the nature of the other matters referred to in (a) (b) and (d) to (f), the emphasis in (c) appears to us in this clause not to be on the fact that the disease has occurred within 25 miles, but on the particular occurrences of the disease within 25 miles. It is the event which is constituted by the occurrences of a disease within the 25-mile radius which must have caused the business interruption or interference. If there were occurrences of the disease at different times and/or different places, these would not constitute the same event and the clause provides no cover for interruption or interference with the business caused by such distinct events."

The court thus rightly accepted two points upon which I rely. First, the other matters in the list of extended perils are relevant to the construction of the individual sub-peril with which we're concerned; and secondly, "event" and "occurrence" are at the very least capable of being used in the same sense as each other. There's no problem with an occurrence being an event.

We return now to the Argenta wording at {C/5/317}, but this is also a list of events in the sense in which that word was used by the court below.

"(a) is a closure or restriction on the premises."

That must be an event at a particular time and place.

"(b) any occurrence of a notifiable disease at the premises or attributable to food and drink supplied from the premises."

Plainly an event in a particular time and place occurring in a particular way.

"(c) a discovery of an organism likely to result in a notifiable disease plainly an individual event."

We will leave (d) to last. Come to (e):

"Any occurrence" again, this time it can only be an event in the sense used in the judgment because it is a murder or suicide at the premises.

Then going back to (d), we have the third use in this list of five of "any occurrence", and read in context, it's plain that this kind of any occurrence is an event in the same sense.

My Lords, in our written case at {B/5/143} at paragraph 81, we have cited some authorities supporting the view that "occurrence" is usually used in the sense of "event". On the next page, at paragraph 82, we've

referred to the primary meaning of the word "occurrence" from the Oxford English Dictionary. We say that the natural reading of "occurrence" in this context is the same in our policy as it is in QBE2.

The second difference identified by their Lordships below is in the judgment at {C/3/103}, paragraph 232, where their Lordships say that QBE2 states that:

"The insurer shall only be liable for loss at those premises which are directly subject to the incident."

They find that the word "incident" further emphasises the focus of the clause.

I've already shown you, my Lords, that the equivalent provision in Argenta at {C/5/317} refers to "occurrence, discovery or accident," that's the exclusion on the right, which gives exactly the same emphasis in my respectful submission. In any event, if these words "incident" and "event" are really the magic words that unlock the obvious construction, they are used in Argenta1 to cover generally the insured perils under the policy.

If you go to {C/5/349}, this is in Argenta, near the beginning of the policy —— sorry, it's not near the beginning, I've got that wrong, near the end, 349, part of the general conditions, you will see that general condition 16(2) and 17(1) both refer to incidence in

a way which simply means a matter that might trigger cover. It means a peril under the policy.

For the word "event" your Lordships can find that in the Argenta policy right near the beginning at page {C/5/265}. In the first line:

"When an event occurs that may give rise to a claim, you should contact your broker."

At page 270, in the top paragraph:

Definition of "excess":

"the amount that will be deducted ... from the total agreed amount of any claim (only one EXCESS will be deducted from the total amount for claims arising out of one event) ..."

Using the word "event".

Then, turning back to the end of the policy, at page {C/5/350}, in the general conditions under the "Contracts (Rights of Third Parties) Act condition" if your Lordships go to paragraph 2(4):

"Up to and at the time of the occurrence of any event which is the subject of any claim under this policy ..."

The person claiming shall observe fully the conditions, et cetera.

If those are the magic words, my Lords, we have them. But, my Lords, we don't make our submissions on

the basis of magic words, as the court below appeared to make its finding, the fundamental issue is what would a reasonable business person understand by the term, "Any occurrence of a notifiable disease within a radius of 25 miles of the premises in the context of this policy"? The answer, we say, is again, with respect, rather obvious: any occurrence indicates a single event.

You can see what you might call the unities of the reinsurance kind of event are all present here. If you look in the judgment at {C/3/84} paragraph 158, your Lordships see four lines down:

"Further, it is common ground between the FCA and Argenta that an occurrence of COVID−19 for the purposes of extension 4(d) requires there to be at least one person within the relevant 25−mile zone on the relevant date who has contracted COVID−19 such that it is diagnosable whether or not it's been verified by medical testing and whether or not it's symptomatic."

There's never been any dispute about what is the nature of the occurrence and it is an event. The place where the event takes place, of course, is expressly stated to be within a 25−mile radius of the premises, and the time when a person contracts COVID or comes into the area already having COVID, is obviously a particular time. So all the characteristics of an event, as the

Divisional Court used that term, are clearly met.

My Lords, this is a convenient point to mention an argument that has surfaced in the FCA's respondent's case in several places which is that because we accept there could be more than one occurrence, it follows that this becomes an insurance for an outbreak of a disease, including an outbreak that exists both within and without the 25−mile radius. That argument involves a fallacy which is really a jagged fault line running all the way through the FCA's case, which is the confusion between, on the one hand, situations that include the insured peril and on the other, situations that constitute the insured peril.

To illustrate the point perhaps we can look at extension 4(b) at {C/5/317} which includes the supply of food and drink from the premises. So imagine, my Lords, that some supply of food and drink from the premises leads one or more customers to contract cholera, which you saw earlier is a notifiable disease, what constitutes the insured peril is each occurrence of cholera that is attributable to the supply from the premises. It does not matter whether there is one or more than one such occurrence, if they cause damage to the business, there's cover for that.

Now, imagine it's discovered that the underlying

cause of the problem was an infection in the mains water supply of the whole region. It may then turn out that there was a wider outbreak of cholera which included occurrences attributable supply from the premises and also included other cases. Extension 4(b) still insures the consequences of the cases which constitute the peril, it does not insure the consequences of the whole regional outbreak, even though they include the occurrences that form the peril.

Now the FCA's response to that answer is what they call the jigsaw or the indivisible cause argument which is the subject of Argenta's ground 4.

My Lords, the indivisible cause —— perhaps we should just see it where the court has actually declared the existence of this thing, which is in bundle {C/1/6}. In relation to Argenta, you see near the top of page 6 declaration 10:

"In Argenta1 and other policies the occurrence of a case of COVID within a relevant policy area is to be treated as part of one indivisible cause. Namely, the national COVID−19 outbreak and the governmental and public reaction of any business interruption. Alternatively, [and of course will take us to ground 5] each such occurrence to be treated as a separate but effective cause of national action and any subsequent

business interruption."

Now, my Lords, apart from this case, the combined might of the FCA's legal team has not been able to unearth one single case or text authority anywhere in the whole world where the metaphor of a jigsaw or the analysis of a part of an indivisible cause has been applied to any form of causation, not just insurance law. That's because these phrases are euphemisms, they are fig leafs for overriding all previous concepts of legal, effective or proximate causation.

The two metaphors, which are used interchangeably by the FCA, are not even compatible with each other, because the jigsaw obviously is divisible into its parts. That's the essence of a jigsaw. If a policy insures one piece of a jigsaw and it turns out later that that piece which was insured is part of a jigsaw, it does not follow that the whole jigsaw is what was insured. That is simply wishful thinking after the full picture is revealed, contrary to the dictum of Sir Thomas Bingham which your Lordships were shown by Mr Crane.

The orthodox approach to legal causation is to view it as a chain. If authority is wanted for that rather mundane proposition, and perhaps it's not, but you can find it in our bundles in The Kos at {E/15/298} where

you can see in the judgment of Lord Clarke at paragraph 75 confirmation that legal causation generally runs in chains, not in jigsaws or in parts of indivisible wholes.

Now, my Lord, I don't mean by saying that to oversimplify the causal enquiry. The chain of legal causation is picked out against the background of the net of factual causation in all its complexity, and it's that task of picking out the relevant chain which is ultimately accomplished with the use of the court's common sense. But the criterion to which the court applies its common sense is the words of the parties' agreement in a contract case including an insurance case.

The effect of the jigsaw indivisible cause argument is the following. The effect is this: square 1 is the insured peril defined in the policy; occurrences within 25 miles. Instead of going from there directly to the loss, as you might in any ordinary case, in this case, you climb up a causal ladder to a more remote cause, the pandemic. You then slide down a causal snake through the government reaction in order to reach the final destination of the loss. But during the whole journey, you don't go back to square 1. The peril is treated as just a starting point which has no linear relevance to

the loss that you claim. The effect of the jigsaw approach is stated in the FCA's respondent's case in many places, one of them where we can just see two points together so it's convenient is {B/10/347} in the FCA's respondent's case where, at paragraph 39, they say this, and we'll obviously need to turn the page in a moment:

"As to this question of construction, the court's primary findings were that the cover for the disease outbreak as a whole is not confined to interruption caused by the part of the outbreak which is inside the radius. Accordingly, there is cover for the disease if it has a local presence and the radius qualifier is merely adjectival."

So there's two points there that I want to draw out. The first is the FCA invites the court to rewrite the clause so that it insures outbreaks of notifiable disease. At other times they go further and they suggest that the insured peril is simply disease and the court sometimes refers to the insured peril as COVID−19. It's also transparent in the judgment that the effect of it is to rewrite the clause, and to see that in relation to Argenta your Lordships can look at {C/3/85}, judgment paragraph 161.

And if your Lordships look at paragraph 161, I'll

paraphrase it if I may. They say: point 1, starting on the second line, the Argenta clause 4(b) −− 4(d) does not mean what it actually says. Point 2, starting on the fourth line, instead it means something different. And point 3, this does no violence to the language used.

Now, with all respect, their Lordships protest too much. Violence to the language is precisely what they have done by that form of reasoning.

If a clause did purport to insure an outbreak before a disease, that word would obviously require definition because, as Mr Crane reminded you, not all notifiable diseases are brand−new pandemics where we know exactly when they started and what a response is a response to. Many diseases have been around for centuries and they wax and wane at varying speeds. As you've seen already at {E/5/88}, mumps and measles are among notifiable diseases and the policy has to apply equally to them as it does to COVID−19. And in fact, as you've seen, Argenta1 does not purport to insure against outbreaks and it does not purport to insure against diseases. It only purports to insure against occurrence of notifiable diseases within a particular radius.

The FCA's emphasis that such −− my Lord, Lord Leggatt has a point.

LORD LEGGATT: Are you suggesting, Mr Salzedo, that it's

necessary to prove a causal link for the purpose to apply between a particular individual case and the interruption of the business? Surely there can be a set of cases −− even on your construction, wouldn't you accept that there could be 50 occurrences of a disease that causes an interruption and you don't have to show that each is separately and discretely a cause.

MR SALZEDO: Yes, absolutely right, my Lord, I do accept that and, as I mentioned earlier, that's where the −− the FCA treat this as −− that point as if it's a concession that we're insuring outbreaks and I hope I dealt with that by saying −− by submitting that the fact that we accept that if there are 50 outbreaks within a 25−mile radius the question then will be, "After that date, what did those 50 outbreaks cause?" does not mean that we accept that we are insuring in general an outbreak consisting of those 50 plus another 100,000 from somewhere else. And that's the distinction between the two cases. But, yes, if I spoke as if I was suggesting that there had to be an individual causal chain from each one, then I didn't mean that. But of course it does depend −− it may be relevant to the date on which any claim starts from. If an interruption is claimed from a certain date, it's the cases up to that date that have to cause the interruption. There may be

more cases at a later date, there may be different cases at a later date, and −− but I certainly accept it's that group of occurrences within the 25 miles which are the insured peril and from which a causal chain must be picked out to loss.

LORD LEGGATT: Thank you.

MR SALZEDO: Now, given that the Argenta policy does not purport to insure outbreaks or diseases, your Lordships might expect to find something in the judgment or in the FCA's written case to deal with the point of language as how as a matter of language peril 4(d) could be understood to mean that there's cover for the effects of an outbreak as far as the borders of the UK, or maybe it's England and Wales, or maybe it's England −− I'm not sure what "national" means −− but no further.

The only linguistic point made in the judgment to support this is at {C/3/85}, paragraph 160. And in the first sentence of 160 their Lordships said:

"Critical here again is in the fact that Extension 4(d) does not say 'any occurrence of a NOTIFIABLE HUMAN DISEASE only with a radius of 25 miles of the PREMISES' or anything which dictates such a reading."

My Lords, there's the obvious point that what's missing is generally treated to be quite a weak argument

of construction but, leaving that aside, there are four reasons at least −− four main reasons I would like to put forward as to why that proposition makes no sense.

First, the word "only" is implicit in every definition of an insured peril. If damage caused by fire is insured by clause X, it's only such damage which is insured by clause X.

Secondly, adding the word "only" where the court would have it added seems to mean that the disease itself must not spread outside the 25 miles in order to remain a peril. But we've never suggested the fact that the disease or a given outbreak may include occurrences outside the radius is an answer to a claim. The suggested wording by the court, therefore, would impose a restriction for which we've never contended.

And, thirdly, the word "only" is equally missing from QBE2 and 3 where its absence did not concern the court and the same point might be made, while I'm on this, about any of the alleged anomalies or the indivisible cause point altogether, as we point out in our written case at paragraph 94(2). The fact that QBE2 and 3 can be read sensibly free of those concerns shows that those concerns are not decisive in a way that would require Argenta1 to be read contrary to its express terms.

And, fourth, the word "only" is not found in any of the Argenta BI extensions either. As I showed your Lordships earlier, peril 4(b), for example, at {C/5/317} is syntactically identical to 4(d).

In our written case, at paragraph 74(3), we made the point that the judgment below would imply that 4(b) −− which you remember is cases at the premises or attributable to food and drink supplied from the premises −− that that clause would cover any loss from the pandemic, which is even more extraordinary than the result reached in relation to 4(d).

As Mr Crane mentioned, the FCA's response to that point is in their written case at {B/10/394} at paragraph 194. And what the FCA say in paragraph 194, in the last sentence of that paragraph, is:

"The clause envisages measures directed specifically at the premises to stop that repetition or spread; measures that would be taken on a national or wide area basis. The fortuity is therefore, as a matter of construction, contemplating and limited to at−the−premises aspect of any disease, not a wider outbreak."

So they concede that 4(b) is limited.

They then attempt at paragraph 195 to distinguish 4(d). And the only point they make in paragraph 195 is

that 25 miles is further away and suggests a wider outbreak and potentially more responsive measures than the words "at the premises".

Now, my Lords, that's true, of course. The question though is: how much wider? And the answer is given in the question. It's precisely 25 miles wider.

The FCA does not and cannot point to anything in the wording of peril 4(d) that would assist a reasonable reader to understand that the phrase "within a radius of 25 miles" is, in their term, adjectival and thus plays a quite different role to the words "at the premises" in 4(b).

Now, my Lords, I've got a couple more things to say about "adjectival", but I see the time and I wonder if your Lordships would prefer to take a break now.

LORD REED: Yes, thank you, Mr Salzedo. We'll adjourn now and resume at 2 o'clock. Thank you.

MR SALZEDO: Thank you.

(1.00 pm)

(The luncheon adjournment)

(2.00 pm)

LORD REED: Welcome to the Supreme Court where we're hearing the appeal in the proceedings brought by the Financial Conduct Authority against a number of insurers. We're ready now to return to Mr Simon Salzedo

QC who is making submissions on behalf of insurers named Argenta.

Mr Salzedo.

MR SALZEDO: My Lord, thank you. Just before we broke for lunch I was showing your Lordships the phrase "merely adjectival" which, as you know, is in the judgment but I was showing it from the FCA's written case at {B/10/394}. I was making the submission that labelling the express definition of the peril as "merely adjectival" does not advance the argument, but it does reconfirm that what the FCA is asking the court to do is to rewrite the clause. It also begs the obvious question: if the radius limit is merely adjectival, then what is the noun?

Now, in the clause we know what the noun is, it's "any occurrence", but that doesn't assist the FCA's case because to say "within 25 miles is adjectival of any occurrence" doesn't really say anything other than the words of the policy. What they seem to mean by using the phrase "merely adjectival" is actually that you should change the noun and that the noun is not "any occurrence" but the noun should be something like "any outbreak of a disease including an occurrence". But, "outbreak" is not relevantly in the wording at all. So when your Lordships see this phrase "merely adjectival"

your Lordships should bear in mind that what's really being hidden by it is actually an attempt to change the noun, not an attempt to say what is and isn't an adjective.

My Lords, the court below, of course, did purport or claim to be determining the intention of the parties in the traditional sense, but it nowhere formulated in relation to Argenta what exactly the intention of the parties was and more importantly on this point, the point about the jigsaw point, the court, I'm afraid, lost sight of the principle that the intention of the contracting parties is to be gathered primarily from the words of the contract and not from anything else.

My Lords, I move then to ground 5, separate concurrent causes. So this is the alternative argument of the FCA, which the court below described as less satisfactory but said it would in any event accept if the first argument was not, and that is that each and every occurrence of COVID−19 was a concurrent proximate cause of all the government measures and public reactions that came after that occurrence.

Now, my Lords, we've dealt with this in our written case at {B/5/148} from paragraphs 97 to 105, and I adopt all of those points. But in my remaining time I'd like to develop just one point about this.

The law on this point includes, and perhaps almost starts in terms of express statement, with a well-known statement of Mr Justice Devlin in Heskell v Continental Express, which was before the court below, although it's not itself in our bundles, but you can see it in bundle {G/11/118} where, at paragraph 53 of I think one of the skeleton arguments that was before the court below, there's a quotation from Mr Justice Devlin in Heskell v Continental Express that where:

"... a breach of contract was one of two separate causes of loss which were 'both co-operating and both of equal efficacy,' that would establish liability."

My Lords, although other aspects of the decision in Heskell have been questioned since, that particular dictum has been followed many times. As your Lordships know, it was accepted by the Court of Appeal in Wayne Tank. If we could quickly look at that at bundle {F/50/1055}. In the judgment of Lord Denning, at page 67C of the report, you can see that Lord Denning also talked of:

"... not one dominant cause, but two causes which were equal or nearly equal in their efficiency in bringing about the damage."

My Lords, at the foot of that page, just going over

to the next page {F/50/1056}, Lord Denning again referred to the matter in a similar way:

"Their exemption is not taken away by the fact that there was another cause equally efficient also operating to cause the loss."

And your Lordships can see in our bundle at page 1057 {F/50/1057}, which is the next page on that Lord Justice Cairns at the very top of the page also -- well, in fact, sorry, if you start at the bottom of 1056 {F/50/1056}, just starting at the bottom of 1056 Lord Justice Cairns said:

"But for my part I do not consider that the court should strain to find a dominant cause if, as here, there are two causes both of which can properly be described as effective causes of the loss. Mr Le Quesne recognised that if there are two causes which are approximately equal in effectiveness, then it is impossible to call one rather than the other the dominant cause. I should prefer to say that unless one cause is clearly more decisive than the other, it should be accepted that there are two causes of the loss and no attempt should be made to give one of them the quality of dominance."

Similarly, in The Miss Jay Jay, if your Lordships would look at that, please, at {E/23/584}, in the

judgment of Lord Justice Lawton on the right-hand side of that page, 36, from the report, he refers to Wayne Tank and said:

"In that case there were two causes of a fire ... This Court adjudged that the dominant cause came within the exception. All three members of the Court, however, considered what should happen when there were two causes which were equal or nearly equal in their efficiency in bringing about the damage ..."

That was the case being considered.

Similarly, at {E/23/588}, in the judgment of Lord Justice Slade, at the very top of this page, page 41 {E/23/589} of the report:

"I therefore conclude that the loss in the present case is properly to be treated as having been 'proximately caused' by a peril insured against ... even though the faulty design ... may have been of equal efficiency in bringing about the damage."

So what we have here is a series of statements of the law, which have been treated as authoritative ever since, which suggest the following: that the process the court goes through is, first, to identify the efficacious or effective or proximate or substantial causes of the loss, of which there will normally be one, two, perhaps in a case that hasn't yet come to court

there could be three, and then the court will work out whether one of them is dominant, in which case it is the proximate cause, or if more than one of them are of approximately equal efficacy. In that case the well-known consequences, for insurance anyway, set out in Wayne Tank and The Miss Jay Jay take effect.

Now, my Lords, in this case if you were to say that all of the hundreds of thousands of occurrences of COVID in the UK in the early months of 2020 were of equal efficacy, including the vast number that were never diagnosed and many of which had no symptoms whatsoever, so nobody knew they existed, that could only be on the basis that the causal potency of which one was approximately zero.

Now, you might say, yes, 100,000 things all with approximately zero causal potency are of equal efficacy. But, my Lords, the problem with this argument is that it turns the process on its head. The court does not start by saying there are millions of facts about the world which all contributed an infinitesimal amount to the final outcome and to the policyholder's loss and, since all those contributed an infinitesimally small causal amount, they're all of equal efficacy and therefore they're all proximate causes. Of course the court does not do that.

Instead, the court starts, obviously with the assistance of the parties, by identifying from among the millions of facts about the world the ones that are candidates to be proximate causes. The ones that are of sufficiently important causal effect to qualify. In the case of insurance, the key question is whether the insured peril is among those candidate proximate causes. If there's a dispute, the court then chooses from among those candidate proximate causes and in some cases will say more than one is of equal efficacy.

The effect of the judgment below on this point is to say that there's an infinite number of infinitely small contributions and that adds up to the whole. But anyone with a mathematical background will tell you that if you start dividing by zero or by infinitely small quantities, then your analysis will lead you to fallacious results. The same is true of causation.

My Lord, Lord Leggatt.

LORD LEGGATT: May I put a hypothetical case to you, Mr Salzedo.

Suppose that there is a bus standing at the edge of a cliff and 20 people get together and between them they push the bus over the cliff leading to its destruction. We can suppose that any one individual wouldn't nearly be strong enough on their own to push the bus over the

cliff. Indeed, it would have taken 15 or 16 of them to do it. That also means that if you ask, in relation to any one particular individual, whether that person hadn't taken part would the bus still have been destroyed, the answer is "yes". But might we not want to say in that example that each person's contribution was an equally effective cause of the loss?

MR SALZEDO: My Lord, the final question -- obviously an equally effective cause it may well be on your Lordship's example, but that doesn't make it a proximate cause because the question is what are the substantial causes?

In that case, it would depend what purpose you were asking the question for. I mean, to make it equivalent to an insurance context, you'd need to be saying that the bus had insurance against the possibility of passenger 1 destroying it, but no insurance against the other 19 doing so.

Now, if that was the position, there would then have to be a factual enquiry as to what was the nature of the joining together of the 20 people in their decision to push the bus over the cliff and what were the causes of that.

Now, if the position is that passenger 1 was simply someone who went along, was overborne, perhaps, by the

forceful personalities of some other passengers who decided that this was the thing to do, then it may well be that passenger 1's contribution was not a proximate cause of the loss. If passenger 1 was the ringleader, then it may be that theirs was. If your Lordship is simply positing well, as a matter of physical force they all joined together equally, then my submission is that's a totally unrealistic example because this isn't a question in physics, this is a question in legal causation and in legal causation what matters is what caused it to happen.

Now, as a question of physics you've then got 20 exactly equal causes and it may be that a physicist would say that they are all, 20, equally the cause, if that's the case. It may be a physicist could work out you needed ten. In legal causation, the question is: was there some kind of joint effort? Was there a motive force and, if so, what was it and what caused it?

My submission is one can come up with logically possible physics examples, but in the law one looks for the proximate causes and in all the time of the development of the common law, as it happened, I'm not sure there's ever been more than two and certainly not more than three. I'm not saying it's impossible, I'm not saying it couldn't be three or four, there's no

reason to make a principled division in terms of number, but where there is a reason to take a principle division is in the order of enquiry which is you've got to look for seriously effective causes and then choose your proximate cause or causes from among them.

My Lords, the reason you have to do that is because if you use the analysis of the court below and just say you've got an infinite number of infinitely small causes, then you can prove effectively anything and the certainty of contractual construction is set at nought and, in our submission, that is not the way to go.

My Lords, therefore that ground should also be upheld, in my respectful submission.

Ground 6 is the Orient-Express which I leave to Mr Kealey.

My Lords, can I assist your Lordships any further?

LORD REED: Thank you very much, Mr Salzedo.

In that case we can turn next, I think, to Mr Kealey on behalf of MS Amlin.

Submissions by MR KEALEY

MR KEALEY: My Lord, yes, I'm Gavin Kealey and I act for MS Amlin. I shall be making submissions on the disease clauses in the Amlin contracts, on the relevance and application of the factual "but for" causation test in those contracts and generally, and on behalf of insurers

on Orient−Express.

Now, it's not my purpose to defend either Lord Hamblen or Lord Leggatt in relation to the Orient−Express. They can defend themselves much more adequately than ever I could, but nevertheless I'm going to have an attempt which may or may not be successful. Our written case, my Lords, is at {B/7/205} and it is commended to your Lordships. I commend it to your Lordships mainly because I had no part in its writing and therefore it is much better than anything that I can actually personally deliver, but it is very good. Any gaps in my oral submissions −− and there will be lots of them −− can be filled by looking at our written case.

Now, in the relation to the Orient−Express, I'll come back to that towards the end of my submissions but we say that the decision of Hamblen J, as then he was, if I can call him that, in Orient−Express is relevant to two essential matters.

First, the identification of the insured peril as distinct from the uninsured cause of the insured peril. secondly, the existence, application and effect of the factual "but for" causation test, both as a matter of contract, but more specifically as a matter of insurance contract law. It is also, as it happens, a decision on

wide area damage. It is instructive in the present context of wide area disease, and we say that it was right to decide it both at, as it were, first instance by the arbitral tribunal and also on appeal by Mr Justice Hamblen.

Now, you've just heard Mr Crane and Mr Salzedo. We adopt their submissions. Whilst our causes are not identical to those of QBE and Argenta, we say that on the proper analysis, the differences are not substantive.

My Lords, I'm going to be unfortunately a little tedious because I have to take you to the MSA disease clauses before I delve into areas of law of factual causation.

Now, there are two MSA disease clauses, MSA1 and two. They are materially identical, so I'm just going to focus initially on MS A1 and your Lordship will see MS A1 in {C/10/504} and the relevant page at which you should begin is 504.

One thing that you should bear in mind while I take your Lordships through, as it were, the preamble parts of this contract, is that the causal connector in my client's disease clause is the word "following". So when I emphasise the word "following" you'll know why I am placing emphasis on it. If I emphasise another

causal connector, you will probably be able to deduce why I'm placing emphasis on that other causal connector.

But the welcome page is at {C/10/504}. If you have it in front of your Lordships, it is part of the contract. It is not just a welcome page, rather like a sort of invitation or just say "hello, it's nice to see you", it is actually part of the contract and you'll see that from the second paragraph:

"This document, any endorsements, certificates and the schedules must be read together as one contract as they form your policy.

"In return for payment of the premium shown in the schedule, we agree to insure you against ..."

The first bullet point is:

"Loss or damage you sustain."

In other words, physical damage. It's the material damage clause that your Lordships find typical in these contracts. The second bullet point is:

"Loss resulting from interruption or interference with a business following damage."

The third bullet point, not relevant, is:

"Legal liability you incur for accidents."

That's the welcome page, and you'll see that it says "following damage". Now if you compare that, my Lords, with the main business interruption insuring clause,

which your Lordships will see in the same document at page 560 {C/10/560}, and as I read this out you'll recall the emphasis I placed on "following", following damage. In the insuring clause, the draftsperson has said, this is business interruption option, section 6:

"For each item in the schedule, we will pay you for any interruption or interference with the business resulting from damage to property used by you at the premises for the purposes of the business occurring during the period of insurance caused by an insured cover and provided that damage is not excluded under section 1."

Now, there are two things to be borne in mind when I read that out as they come to me. Firstly, of course "resulting from" is equivalent to "following". In other words, the draftsperson uses "resulting from" interchangeably with "following". My Lords, whether that's as a matter of elegance of prose or whether it is deliberate, I know not, and nor do you but it's quite clear that they are interchangeable.

Secondly, and this is just a passing remark of no great significance, but your Lordships may like to point it out or I will point it out to you, it says:

"Provided that damage is not excluded."

In other words, when the draftsperson wants to use a

proviso, the draftsman uses a proviso. When it says "provided that damage is not excluded", then that's the proviso that it employed. There was no such proviso in any of the disease clauses. You've heard from Mr Crane and Mr Salzedo on that, but the draftsperson in this contract could well have used the same proviso language if he or she had wanted.

Definition of damage, because we've seen damage is emboldened, is way back at 512, so it's {C/10/512}. And damage there, my Lords, is:

"Loss or destruction of damage to the property insured as stated in the schedule."

In other words, it's physical loss or damage as found by the court below and we don't disagree with that at all.

Then your Lordships, I'm afraid to jump again, to go now to bundle {C/10/560}, same bundle. So just below the insuring clause that we've just looked at, we see, as it were, at the second hole punch that your Lordships may or may not have, we have "Claims — basis of settlement A — Gross Profit".

It says:

"The insurance by this item is limited to loss of gross profit not exceeding the limit of liability due to:

"a) reduction in turnover ..." et cetera.

Then it says:

"... the amount payable will be:

"1 for reduction in turnover, the sum produced by applying the rate of gross profit to the amount by which the turnover during the indemnity period will following the damage ..."

In other words, that's the amount by which the amount of the turnover will, following the damage, in other words caused by the damage, "fall short of the standard turnover."

Then your Lordships should know the definition of "standard turnover" which is at page 559 {C/10/559}, that immediately preceding that on which I am.

"Standard turnover" is defined as:

"The turnover during that period in the 12 months immediately before the date of the damage which corresponds with the indemnity period to which adjustments will be made as necessary to provide for the trend of the business and for variations in or other circumstances affecting the business had the damage not occurred."

So the figures adjusted represent as nearly as may be reasonably practicable the results which, but for the damage, would have been obtained during the relative

period after the damage.

So the "but for" factual causation test is directly applicable to the standard turnover and to adjustments to be made.

Now, these are very typical clauses. They're called trends clauses, standard turnover clauses. They're covered by my Lord Mr Justice Hamblen in Orient−Express. They are typical of all the contracts with which your Lordships are concerned and indeed the way in which the court below treated the reference to "damage" in the context of the extensions to business interruption was to replace "damage" with "insured peril" and we don't disagree with that at all.

In relation to the extensions, the business interruption extensions, it would read:

"Affecting the business had the insured peril not occurred so that the figures adjusted represent nearly as may be reasonably practical the results which but for the insured peril would have been obtained during the relevant period after the operation of the insured peril."

My Lords, if you could now go to page 566 {C/10/566} −− I haven't even got to the disease clause yet, but if you go to 566, you will see the "Action of competent authorities". This is the beginning of the

business interruption optional additional cover section, and it's provided as standard. So it comes with the policy, my Lord.

"We will pay you for:

1. Action of competent authorities.

"loss resulting from interruption or interference with the business following action by the police or other competent local, civil or military authority following a danger or disturbance in the vicinity of the premises where access will be prevented provided always ..."

Again, my Lords, the draftsperson knows exactly what a proviso looks like and can even write it:

"... provided always that there will be no liability under the additional cover for loss resulting from interruption to the business during the first 24 hours."

My Lords, there's a generous display there of the word "following". Now, en passant, I mention that the court below correctly accepted that the word "following" in that clause meant "caused", not some loose causal connection. Rather, my Lords, a direct causal connection. In other words, the business interruption must have been caused by the action of police, et cetera, and must have been caused by the action of police, et cetera, following a danger in the vicinity of

the premises.

So you can have a danger in the vicinity of the premises, which could be, in fact, outside the vicinity of the premises as well, but the court below considered that it was only the danger within the vicinity of the premises which was the necessary causal requirement. Your Lordships see that, my Lords, at the judgment at paragraph 437, which if your Lordships could turn to it, is in bundle {C/3/155}.

My Lords, I think Mr Crane read 436. I'm going to read 437 to you.

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

"It is highly unlikely that that could be demonstrated in any particular case. The narrow and localised nature of this cover means that the wider issues of causation and counterfactuals, such as we've discussed in relation to Arch and EIO [that's Ecclesiastical, my Lords] wordings above and such as we discussed earlier in the judgment in relation to the

so−called disease clauses and hybrid clauses do not arise."

So the court there construed "following" as meaning "caused by" and required that which was local −− that which was local, my Lords −− to be causative of the business interruption.

Against that background, my Lords, I now turn to the disease clause which your Lordships will find at page 567. That's {C/10/567}. Which is obviously the primary cause with which I'm concerned at this stage of my submissions.

Now, your Lordships see that clause and as you cast your eyes down, you will see that, apart from (a)(iii), every insured peril there identified is something occurring at or from the premises. The exception is (a)(iii). It says:

"Consequential loss as a result of interruption or interference with any a business carried on by you at the premises following:

"iii. any notifiable disease within a radius of 25 miles of the premises ..."

Now, there's four specific components to which I wish to draw your attention.

First, "notifiable disease" is not an abstract concept, it is a defined term, and the definition, my

Lords, you'll find back at page 559 {C/10/559}. It's not disease generally, as the court below appears to have thought. Just for your reference, my Lords, paragraph 196 at {C/3/94}. It is specifically, my Lords, illness sustained by any person resulting from:

"b) any human infectious or contagious disease (excluding ... AIDS)) an outbreak of which the competent local authority has stipulated will be notified to them."

Now, in doing that I've actually missed out (a). That was actually deliberate so I could emphasise now (a) because it is:

"Illness sustained by any person resulting from food or drink poisoning or any human infectious or contagious disease."

Now, it is all preceded, my Lords, by illness sustained by any person resulting from (a) or (b). It is therefore specifically illness or illnesses sustained by persons resulting in our case from COVID−19. If a person sustains an illness, in other words falls ill from disease, that in any normal sense is a form of occurrence or event. It is specific to that person. It is something that that person has sustained. It is something that that person has had, as it were, befallen upon him. It's not a state. It's not a situation.

It's not a state of affairs. It's not the existence of something. It is actually someone sustaining illness. It is an event. It is an occurrence in all but name.

If your Lordships take notifiable disease and the definition and you plug that in at page 567 to the notifiable disease clause, it reads as follows, my Lords:

"Consequential loss as result of interruption of or interference with the business carried on by you at the premises following illness sustained by any person resulting from any infectious or contagious disease, an outbreak of which the competent local authority has stipulated will be notified to them."

That's the first component.

The second component, my Lords, that you have to bear in mind is that a boundary is set around the insured premises. The boundary is "within a radius of 25 miles of the premises". So the cover is in respect of illness or illnesses sustained by persons resulting from food or drink poisoning or infectious disease, here COVID−19, within 25 miles of the insured premises. And, my Lords, "within" means inside not outside the boundary.

What the parties have done is to have drawn a line. The insured takes the risk of illness outside the line,

and the insurer takes the risk of illness within the line. It's as simple as that.

That which is outside the line, is uninsured; that which is inside the line, is insured.

Now, as we say in our case, which I've asked you to read later on, if you haven't already read it, that may be an arbitrary line, but it is a line.

The third component, my Lords, is the "causal connector following". That, of course -- and I'm going to come back to that and develop my submissions, that is a causal connector, there's no dispute between the parties, and the court held that it was a causal connector, albeit a loose causal connector. That is a causal connector linking the 25-mile cases of COVID with the business interruption and the business interruption losses.

The fourth component, my Lords, is to a degree superfluous and even some would say totally inapposite, but it's the meaning of "consequential loss". Consequential loss, which is emboldened is defined at {C/10/512} and you'll ask yourselves why is that fool Kealey taking us to this? Because I've just said it's perhaps superfluous and inapposite. But if your Lordships look at consequential loss, there is some meaning or sense to my madness. It says:

"Loss resulting from interruption of or interference with the business carried on by you at the premises in consequence of damage to property used by you at the premises for the purpose of the business."

So we've got following damage, we've got resulting from damage, we've got in consequence of damage. All those in the eyes of the draftsperson and anyone reading this, we would respectfully suggest, all those causal connectors are the same. They are all interchangeable. Though the reason why, my Lords, consequence loss might be regarded as a little inapposite is because if you plug consequential loss into the notifiable disease clause at {C/10/567} -- and I hate to read it out, but I have to -- and your Lordships will see why it makes little sense, because it says:

"We will pay you for loss resulting from interruption of or interference with the business carried on by you at the premises in consequence of damage to property used by you at the premises for the purpose of the business as a result of interruption of or interference with the business carried on by you at the premises following any notifiable disease ..."

Which, you might say, makes little or no sense, but there is some sense. The idea of consequential loss being plugged in there in conjunction with "in

consequence of damage" indicates that the draftsperson, whether not terribly well done or terribly ill done, was trying to convey the causative connections that we say exist between insured peril and business interruption and business interference which we say is the loss. We endorse what Mr Salzedo said before us.

Now, I'm going to repeat something that one of my learned friends, probably both of them, said before me and therefore you will say "Well, don't say it", but I'm going to say it nevertheless until you tell me to shut up, which is that those parts of clause 6 which talk about disease or other perils at the premises, the FCA has accepted, it seems, that "following" does not denote some loose causal connection. But, rather, we would say a tight causal connection such that what occurs at the premises must be the source of and so must have caused the business interruption at the premises.

Put another way, the FCA have accepted in relation, for example, my Lords, to 6(a)(i) that this is not a case of the insured being covered for business interruption at the premises resulting from notifiable disease everywhere in the country, provided that someone at the premises at some stage can be proved to have sustained disease there.

My Lords, that you will see reflected at

paragraph 194 of the FCA's respondent's case and 195, that's at {B/10/394}.

Now, the FCA has not told us what it thinks is the correct answer to the interpretation of "following" in relation to those parts of the definition of "notifiable disease" which comprise illness sustained by any person resulting from food or drink poisoning. Must those illnesses have caused business interruption at the premises or is it sufficient for recovery that there should be business interruption at the premises as result of food or drink poisoning anywhere in the country, provided that someone may be proved to have sustained similar food or drink poisoning at the premises? The answer to that is obviously not.

It would be ludicrous to suggest that the food and drink poisoning at the premises should not have been directly causative of the business interruption, but that is part of the definition of "notifiable disease" and one can imagine who would drink poisoning in the area of the premises up to 25 miles, even possibly, I can't think of many instances, but it's not impossible. It's quite clear, in our respectful submission, that when you have one causal connector following in one clause, one would expect it to mean the same thing in respect of (a) (i), (ii), (iii), (b), (c)

and 4, not something different.

We would endorse the suggestions made by my learned friends before me that "following" there, the implication of my learned friends' submissions, "following" there is a causal connector, it's not a loose causal connector and we're going to tell your Lordships in a moment that it means proximate cause, equivalent to, resulting from or in consequence of, and we'll also going to tell your Lordships that it doesn't much matter at the end of the day, even if it is a looser connecting cause, because we say that the factual causation test must apply. Once you have a cause, it's either a cause or it's not a cause and, therefore, by definition, if you have a cause, the "but for" factual causation test must be satisfied.

So after that rather terse introduction, my Lord, the key question on the MS A disease clause is framed by the language of the contract. It is this: did illness or illnesses sustained by any person or persons resulting from COVID-19 within 25 miles of the insured premises cause business interruption or interference at those premises and the business interruption losses claimed by the insured? That question has two elements. The first, on which I have already made submissions, is illness sustained by any person resulting from COVID-19

within 25 miles of the insured premises.

The second element, on which I've also made some submissions, is causation. Assuming that the insured can prove cases of illness within 25 miles, have those cases so operated as to satisfy the causal connection that has to be established between those cases and the business interruption losses for which the insureds claim an indemnity under the MS A policies.

This second element, as you know, arises in the specific context of contracts of insurance. As my Lord Lord Hodge said in McCann's Executors, your Lordships will see that, I needn't take it out, it's at bundle E, divider 43, page 1196 {E/43/1996} which, as my Lord, Lord Hodge, knows it's a Scottish case, but it's equally applicable in this instance to this country. As my Lord said:

"The context is important whenever questions of causation are being asked."

That's paragraph 13 of my Lord's opinion:

Because "it determines the nature of the causal investigation."

Those are almost his words. As in this case, as in that case, so also in this. The relevant context is contracts of insurance and more specifically, my Lords, insuring clauses within those contracts.

If I can answer a question that my Lord, Lord Leggatt asked a moment ago in relation to buses or a bus, the causation question is not an abstract one as to cause. It is not what was the cause of the business interruption losses suffered at the insured premises. That is, with respect, the wrong question.

Rather, it is: did the insured peril cause the business interruption losses at the insured premises within the meaning and application of the causal requirements of the insurance contracts? So taking my Lord's example, a bus and 20 people pushing the bus, well if only one person of those was an insured, or if only that person's efforts were insured, the question would be: did that one person cause the bus to go over the cliff? The answer to that, dare I say it, unless he was a Hercules of Herculean proportions and all the others were very, very small and weak people, the answer to that is probably no, because that person cannot satisfy the factual causation requirement of "but for". In other words, he cannot satisfy the factual cause test. But for that person's efforts, the bus would still have gone over the cliff and that's the answer, in our respectful submission, to my Lord, Lord Leggatt's question. I hope that's the right answer. Anyway, that's my answer.

We say that the causal connection that the insured has to prove between the 25-mile cases and the BI losses at insured premises is one of or akin to proximate cause. We say that based on the language and the law, but irrespective of that, as I've just indicated, the minimum causal connection that the insured has to prove is that the business interruption losses would not have been suffered but for those proved 25-mile cases of COVID-19. That, my Lords, is the basic and fundamental factual causation test found in contract and in tort, with very few and very exceptional exceptions on which no party relies in this case.

We say, as a matter of simplicity, X cannot in any sense be a cause of Y, whether proximate or not, if Y would have happened irrespective of X. In other words, but for X.

My Lord.

LORD LEGGATT: On that basis, Mr Kealey, it means, in my example, none of the people caused the bus to go over the cliff.

MR KEALEY: And that is why --

LORD LEGGATT: You can equally say of any individual that their efforts alone were not. So you embrace that conclusion, do you?

MR KEALEY: No, I just tell your Lordship that

your Lordships just asked the wrong question. If you are, say, a scientist and you're asking the question: what caused the bus to go over the cliff? You would say it was the joint efforts of all 20. But that's not the right question. The scientist is not an insurance contract lawyer and is not looking at the right question. The right question is the question that I identified, which is: is that one person, if that one person is the insured, did he or she cause the bus to go over the cliff?

Now, the answer to that is no because but for that one person's effort, the bus would still have gone over the cliff and therefore, dare I say it —— and I don't mean to say it without respect, I'm saying it with the utmost respect —— you've asked the wrong question. What caused business interruption losses at everybody's restaurant, say, in England? Well, it's the national lockdown or the public disinclination to go to restaurants because they don't want to die of COVID−19 or whatever it is. That is the scientist or the medical expert or the politician's question and the answers.

If your Lordship asks: did 25−mile radius cases of COVID−19 cause that restaurant to shut down? The answer is, and given by the court below, no. The answer given by the court below was different because of its approach

to causation, but the answer —— the right answer —— is, no, those cases didn't. You're not asking the right question if you say: "What caused the restaurant to close down?" You should be asking: "Did the insured peril cause the restaurant to close down?" That is the very important point that I made earlier by reference to what my Lord, Lord Hodge said in McCann's:

"The context is important because it determines the nature of the causal investigation."

In fact, my Lord, it determines the question, it determines the causal investigation.

LORD LEGGATT: Mr Kealey, at the risk of commanding your respect, even utmost respect again, I'm going to try another hypothetical on you, if I may.

MR KEALEY: That's a bit frightening, no.

LORD LEGGATT: This time it's the board of a company and they decide at a company directors' meeting to put on the market a dangerous product and it only requires a majority of the board to vote for that, but in fact they unanimously vote for it. One of them is insured under directors' liability insurance and he makes a claim on the basis that his vote, for which he has subsequently incurred liability, let's say, of damages as a cause of the dangerous product going on the market. Now, if you look at his vote in isolation it would have

made no difference if he had voted the other way because the decision would have been just the same, so it's not a "but for" cause (overspeaking).

MR KEALEY: (Overspeaking). Wrong question, my Lord.

LORD LEGGATT: On your analysis is uninsured because it's not a proximate cause.

MR KEALEY: Wrong question. You're talking about a liability insurance, D&O liability insurance. If that director has been found liable or his liability is established by judgment, settlement or award, that is an insured peril that has arisen under the contract of insurance and that is the proximate cause of the loss under the insurance policy and he's entitled or she's entitled to be indemnified.

So with the utmost, utmost respect, my Lord, I would say that if you're looking at different types of contracts of insurance, you may have to ask different types of questions to come to the right answer.

LORD LEGGATT: Right, okay.

MR KEALEY: I'm sure your Lordship is going to find a much more difficult question for me to answer in due course, which is why I'm going to rush to the end of my submissions before you've had the time.

Now, the importance, my Lords, of the causal investigation is heightened by the FCA's fundamental

case that there is a single proximate cause of all losses suffered by all insureds under all wordings without distinction. You can look at it later, I'm going to tell your Lordship what the FCA says.

Particulars of claim, paragraph 53.1, that's at {D/16/1582}. The FCA says that the proximate cause of all losses is:

"The nationwide COVID−19 disease, including its local presence or manifestation and the restrictions due to an emergency danger or threat to life due to the harm potentially caused by the disease."

The FCA then refined its case a little bit, I don't actually think that it was much of a refinement, it looks like a slightly more generous approach. In its trial skeleton, that is the skeleton below, paragraph 225 {D/20/1603} the FCA said:

"The single [the definite article] the single proximate cause is the disease everywhere and the government and human responses to it."

I need you to bear that in mind, my Lords.

We say that there's an obvious disconnect between what the FCA says is the proximate cause of all losses suffered by the insureds and what is insured under my singular Amlin disease clause. It is this disconnect which in our submission causes the FCA real problems,

and it sought to surmount them in essentially two ways.

First, as we've seen, it seeks to introduce the proximate cause of all the insured's BI losses into the insuring clause through the front door of construction by the use of what we say is an absent proviso.

Secondly, it seeks to introduce the proximate cause of all the insured's BI's losses into the counterfactual by the back door of causation reversing not just the insured's 25—mile cases of illness, but much more besides, including the underlying source or cause of those cases. In other words, the disease everywhere else.

Now, neither of those attempts works, however, and that's because, my Lords, what was covered were cases or incidents of illness sustained by individuals as a result of COVID—19 within 25 miles of insured premises, but those were not causative of any loss at those premises. Whilst what was causative was the national COVID—19 pandemic and the responses of the government and public to that national pandemic, but that was not covered. The FCA and the court below have, with respect, conflated what was covered but not causative with what was causative but not covered.

With that I turn back to the definition of "notifiable disease". We say that the insuring

agreement was clearly confined to cases of specific illness sustained by specific persons as result of COVID—19 within and that means, my Lords, not outside the boundary of 25 miles. It's a basic line.

Can I ask your Lordships in due course to focus on paragraphs 37 and 39 of our case, the Amlin case {B/7/219}. The cases of illness beyond the boundary of 25 miles are simply irrelevant. The insuring agreement did not extend to any national or global epidemic or pandemic. That might be the cause of individual cases of illness within 25 miles, but it's not insured. It didn't extend to any national, global, pandemic or epidemic provided just one case of COVID—19 could be proved, perhaps years after the event, to have existed within the 25—mile radius. That, is my Lords, a misconstruction of the policies: see paragraph 24.1 of our case at {B/7/213}. Your Lordships should know that if that had been the intention, my Lords, then it was very easy to do, all one needed to do was say:

"Following any notifiable disease, provided that there is a case of it within a radius of 25 miles of the insured premises or following any notifiable disease anywhere as from the date when the insured proves a case of notifiable disease within a radius of 25 miles of the insured premises to have occurred."

That's what should have been in the clause in order to, as it were, maintain the FCA's construction and that's nowhere near the clause.

My Lords, I mean one can imagine we've taken, as they say, extreme examples but one can imagine how ridiculous this is. You have the Scilly Isles without a case of COVID—19 for months, but a trawler goes by and on that trawler someone contracts COVID—19 and it happens to be within 25 miles of the Scilly Isles. It has no causative impact whatsoever. In fact, the person on board doesn't know that he or she has COVID—19 and when the trawler docks, say, at Southampton, that person is tested and is found to have had it for a week. Suddenly every single business in the Scilly Isles, which has suffered business interruption losses as result of the government's lockdown, can recover all their business interruption losses.

Let's say that someone with COVID—19, I don't know who it could be, but with COVID—19 travels from London to Edinburgh. Anywhere within 25 miles of that railway line would suddenly be able to recover all their business interruption losses as a result of that one person travelling up on a railway line, 25 miles either side of the railway line, even though all their business interruption losses were actually attributable

to the government lockdown.

Further, my Lords, any case of illness sustained by individuals as a result of COVID—19 within 25 miles of insured premises are simply not indivisible from cases of COVID—19 sustained by individuals beyond that boundary. Dare I say it, my Lords, my illness is not your illness. My pathogen is not your pathogen and they're not somehow rendered indivisible by virtue of deriving from the same virus or being part of the same global pandemic or national epidemic. These distinctions, that's to say between COVID—19 within 25 miles and COVID—19 outside 25 miles, are required to be drawn by the definition of "notifiable disease" and the 25—mile circumscription by radial distance of the insured premises. That, my Lord, with respect, despatches the court's finding, judgment paragraph 111, that's {C/3/69} and at paragraph 532, see {C/3/179} and indeed the FCA's argument of indivisibility such that the disease in the UK was somehow one indivisible cause of all business interruption losses and therefore somehow or other the cases of disease within 25 miles of premises are harvested by some magical process into the epidemic or the pandemic. That just doesn't work as a matter of logic.

My Lords, I now turn briefly to the cause —— well,

actually not so briefly —— but briefly to the causal connector of "following". Yes, my Lord. My Lord, Lord Briggs.

LORD BRIGGS: (Inaudible) the expressions, and I'll for this purpose include disability, have to be looked at in context. I think it may be that one wouldn't —— you and I, if we each separately and on different days got COVID of different severities in different places would think that they were thoroughly divisible in terms of their (Inaudible) and all sorts of other things. But where it's divisible for the purposes of assessing what effect it had on the government reaction and the restrictions the government imposed, might lead to a very different conclusion, might it not?

MR KEALEY: Your Lordship is absolutely right, absolutely right on that, but the way in which it was approached by the court below was, as I think one of my learned friends has already said, if one looks at the court below, the court below asked the question or set out the proposition, and I'll find it, if your Lordship can just forgive me for one second.

It was whether the insured could recover for business interruption losses at their premises even —— ah, here it is, my Lord —— it's at paragraph 81 of the judgment at {C/3/57}. The court asked the question

whether:

"There is cover in respect of a pandemic where it cannot be said that the key matters which led to business interruption and in particular the governmental measures would not have happened even without the occurrence of COVID–19 within the specified radius."

That's at {C/3/57}. We say that the answer to that question must be no. Your Lordship is entirely right, it really does depend upon not only the facts of course, as your Lordship has postulated, but it really does depend —— I go back to the point which it depends on the context in which the question is asked and in which case one has to ask the right question.

Talking about "following", my Lord, "following" imports a causal connector. Everyone is agreed on that. In fact, one of its prominent dictionary synonyms include resultant, resulting, ensuing, consequent. See our case at footnote 15 {B/7/226}. The FCA and the court held that "following" imports something looser than proximate cause and we don't accept that. I've explained to you why.

"Following", my Lord, firstly —— and I will take this very briefly —— is the causal link between the loss and the peril. We endorse what Mr Salzedo said and we endorse not only what we said, but we say that where the

clause says "Loss resulting from interruption or loss as a result of interruption following notifiable disease" the loss and the interruption are there, my Lords, we say as part and parcel of the loss. In other words, the interruption is damage to the insured interest and the loss is simply the pecuniary consequence of that damage to the insured interest.

We say that "following" is actually the causal link between the loss and the peril and therefore the default position of importing the proximate cause test under section 55 of the Marine Insurance Act 1906 applies: see paragraph 59 of our appellant's case {B/7/228}.

As I've said before, these are not essential planks of our argument, the essential plank of our argument stands regardless of whether the insured peril includes or doesn't include business interruption or interference and regardless of whether "following" means proximate cause or some looser causal connection. The essential plank of our argument is that on its proper construction, the minimum causal connection that the insured has to prove is that the BI losses at the insured premises would not have been suffered but for the 25–mile cases of illness.

That was rejected by the court below. The court below rejected the submission that the word "following"

involved the application of any "but for" test, despite emphasising and repeating that the word still involved a causal connection. The court below espoused a test of causation that seemingly does not accept the "but for" principle and the FCA, my Lord, says that the "but for" causation test is only relevant to quantification and your Lordships will see that in their case at a number of paragraphs: 11.4, 11.8, 31, 32, 33, 214, 355.

It's only relevant to quantification, says the FCA, and not to the causal link between the disease and the interruption or even to the link between the interruption and the loss. The FCA does not accept that "but for" is an inherent part of or a necessary precursor to proximate cause: see their case at paragraphs 31 and 32. So a proximate cause can exist despite not satisfying the factual "but for" test. That's the FCA's case.

It disputes, my Lord, the application of the "but for" test in causation even outside the field of insurance: see the FCA's respondent's case at paragraph 374 {B/10/449}. The FCA also says that there is no insurance case which refers to the "but for" test as part of but a precursor to the proximate cause test. My Lords, in our respectful submission, not only is that wrong, but again it's answering the wrong question.

The right question is whether there are any cases where something has been held to be a proximate cause which is not a "but for" cause. With the exception of cases of multiple wrongdoers and cases of exceptions such as the Fairchild v Glenhaven in the area of tort, which isn't a proximate cause case, the answer to that is no. With the exception of exceptional cases, we haven't found any authority that finds a proximate cause which does not satisfy the "but for" test, nor, it would seem, has the FCA, otherwise we would have received that authority from them.

The "but for" test, the factual causation test, this is important, is intrinsic to contracts and to contracts of insurance, because it is intrinsic to the essence of the insurer's indemnity obligation and to the insured's relative right to an indemnity. Contracts of insurance are contracts of indemnity. They indemnify against loss caused by a peril insured against. If but for the peril there would have been no loss, there is no indemnity. I'm going to come back to that in a minute.

But I want to start with the established legal background to the Amlin contracts ie the legal background, the legal context in which those contracts were entered into. Now you know, I hope, and certainly I submit, that the law employs the "but for" factual

causation test as an undemanding essential threshold test to distinguish causes from non−causes, necessary but not sufficient.

Now, sir Christopher Staughton said in Assicurazioni Generali v Arab Insurance Group, at paragraph 187, that's {E/9/161} in the context of inducement:

"Causation cannot in law exist when even the 'but for' test is not satisfied."

If the parties to the Amlin policies had wanted to indicate something non−causal, they could have used language such as "connected with" or "relating to". They didn't. They used "following" and that is a causal connector and therefore the factual causation test has to be satisfied. That which is said to have followed an event must by definition be something that would not have followed but for that event. There is nothing in the policy wording, we submit, to indicate any intention to adopt some novel or bespoke concept of causation which doesn't entail the basic factual cause test, contrary to the court's judgment.

Construing the MS A's disease clauses against the established legal background, we say it imports the "but for" test. So starting with the legal background, I will take this quite quickly and move to insurance contracts particularly.

Whenever a legally relevant cause needs to be selected, such as proximate cause in insurance, the "but for" test provides a range of candidates that satisfy the factual causation enquiry for which the legally relevant cause is to be selected. The "but for" test of factual causation does not replace or supplant the test of legal causation. Now, that two−stage process was described by Lord Hobhouse in a case. Could I asked your Lordships to take out {E/35/1005} and go to the case of Reeves v Commissioner of Police, that's bundle E, divider 35 at page 1005. I'm not going to take your Lordships to many authorities because I know time is short, but I'm going to take your Lordship to this and one or two others.

At 1005 at letter C, B to C, Lord Hobhouse said:

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

the ordinary use of language would, independently of any imposed legal criterion, be said to have caused the relevant consequence. Thus, certain causes will be discarded as insignificant and one cause may be selected as the cause. It is at this stage that legal concepts may enter in either in a way that is analogous to the factual assessment −− as for proximate cause in insurance law or in a more specifically legal manner than the attribution of responsibility bearing in mind responsibility may not be exclusive. In the law of tort it's the attribution of responsibility that is assumed that is the relevant legal consideration."

This "but for" test also applies to the assessment of a liability to pay contractual damages at common law. The two−stage enquiry was described by my Lord Lord Leggatt, with whom the other members of the Court of Appeal agreed in a recent case called Minera Las Bambas v Glencore. You needn't take it out, I'm going to read out to your Lordships the passage, unless the author wishes to look at his own words, at bundle {G/139/2405}. What the judge then said is as follows:

"The distinction between factual and legal causation is well recognised in assessing liability to pay damages at common law. In order to recover damages for a loss caused by a breach of contract or other actionable

wrong, both tests must generally be satisfied. The test of factual causation is whether, but for the defendant's breach of contract, the loss would have occurred. This requires a simple factual comparison to be made between the claimant's actual financial position and the financial position which the claimant would have occupied if there had not been a breach. However, not every loss or gain which would not have occurred but for the breach is treated in law as caused by the breach such that the defendant is held legally responsible for it. In particular, an unreasonable act or omission of the claimant without which the loss wouldn't have occurred may be held to break the chain of causation."

Now, my Lords, that's a classic, if I may respectfully suggest, established description of causation. Anyone agreeing a contract should, as a matter of fact or context, be taken to have it in mind. Lord Justice Leggatt's description, in fact, echoed that authoritatively stated by Lord Nicholls in the tort of conversion case, I will give you the reference, my Lord, it's Kuwait Airways v Iraqi Airways, it's at {E/25/803−804} and that's a description by Lord Nicholls and he says:

"I take as my starting point the commonly accepted approach that the extent of a defendant's liability for

the plaintiff's loss calls for a twofold inquiry: Whether the wrongful conduct causally contributed to the loss and, if it did, what is the extent of the loss for which the defendant ought to be held liable. The first of these inquiries widely undertaken as a simple "but for" test is predominantly a factual inquiry."

Now, as it happens, Lord Hoffmann agreed with Lord Nicholls. The FCA relies upon the extrajudicial writings of Lord Hoffmann a few lines later in which Lord Hoffmann says of the two−stage test is not recognised in English law. I suspect Lord Hoffmann had overlooked his own involvement and agreement in Kuwait Airways that there was a two−stage process, but that's just by the way.

The FCA's assertion that there is no established two−stage causation test is wrong. Importantly, as we're speaking in the context of insurance, the "but for" test is also an established and essential component of any insurance contract. This is important, my Lords, because we say the FCA doesn't quite understand, we say with respect, the character of an insurance contract.

It's a contract of indemnity. As my Lord Lord Leggatt said in Endurance v Sartex:

"the insurer is under the contractual obligation to

hold the insured harmless from loss caused by an insured peril to prevent the indemnified person from suffering loss that is damnum."

"The insurer is automatically in breach of contract and liable in damages if an insured peril operates and causes the insured indemnifiable harm. The insured is therefore entitled to be put by the insurers into the position in which he would have been but for the breach and no better and no worse."

My Lord, I won't repeat what you said in Endurance. It's at {E/37/1053}. Your Lordship said in different terms in Minera Las Bambas at {G/139/2396}.

This is the important bit, my Lord. If but for the insured peril operating the insured would have been in exactly the same position, then the insurer has not even breached its insurance obligations. There will have been nothing from which the insurer was bound to hold the insured harmless. There will have been no indemnifiable harm. Therefore, but for the insured peril, but for the insured peril, the insured would have suffered exactly the same harm and therefore the breach of contract, or the supposed putative breach of contract, will not even have occurred, because the insurer is only in breach if the insured suffers damnum as a result of the insured peril. If but for the

insured peril the insured would have suffered the same damnum, ergo the insured peril caused no indemnifiable harm, the insured was never in breach of any contract.

Finally in this context −− I'll have to rush a bit −− the "but for" test is also an inherent part of the proximate cause test. An insured peril cannot even begin to be a proximate cause unless it is also a factual cause. That's clear, my Lords, from the judgment of Lord Justice Lindley in the case of Reischer v Borwick. That's in {F/40/829}.

If your Lordships look −− and I don't invite your Lordships to do so now because of time −− at {F/40/831−833}, it's clear that a proximate cause is necessarily one that as a minimum is a "but for" cause, and that appears from Lord Justice Lindley's judgment. It also appears, my Lord, appears from my Lord Lord Hodge's opinion in the case of McCann, the case to which I referred earlier. I'll quote from Lord Hodge at {E/43/1200} where my Lord said:

"It appears to me that in using the concept of proximate cause the court in most circumstances applies not only a 'but for' test to establish a causal connection between two or more events on the particular occasion, but also further tests such as directness of effect and the degree of causal contribution of an event

to identify an operative cause."

That's at paragraph 12 of my Lord, Lord Hodge's opinion, cited with approval by Lord Clarke in The Kos. That's {E/15/298}. It also happens to have been followed by Mr Justice Hamblen, as then he was, in the Orient−Express.

Even where the insurance contractual language mandates a looser causal connection than proximate cause, such as by the use of the phrase "attributable directly or indirectly to", the courts have held that at a minimum the "but for" test must be applied. The Master of the Rolls, Lord Phillips, said in Blackburn Rovers v Avon Insurance, an insurance case:

"Disablement cannot be said to attributable, either directly or indirectly to a pre−existing condition unless, at the least, the condition is a causa sine qua non of the disablement."

That's at {E/11/195}. Then there's one final point on "but for" causation, my Lords. The FCA refers to concurrent interdependent and so−called concurrent independent causes in its written case. It's very important to bear in mind the differences between the two.

Where the insurer's loss is attributable to at least two causes in combination, in the sense that the loss

would not have happened if only one of the causes had been operative and each is a proximate cause, that situation is one of concurrent interdependent causes. In that situation, both causes satisfy the "but for" test precisely because the loss would not have happened if either one had not been operative. In that case, the law is that the insured can recover so long as one of the causes is insured and the other is not excluded: see Wayne Tank and Miss Jay Jay at {F/50/1045}, {E/23/580}.

Wayne Tank and Miss Jay Jay and all the cases applying the principles established in those cases, including the B Atlantic, see Lord Mance, that's at {H/3/44} are all cases of interdependent causes. Each cause is both a "but for" and also a proximate cause of the loss. As was recognised by my Lord, Lord Hamblen in Orient−Express.

By contrast, the phrase "concurrent independent causes" is used where there are two concurrent events each of which would have been sufficient on its own to produce the entirety of the insured's loss but neither of which was necessary. Concurrent independent causes do not satisfy the "but for" test: see Lord Clarke in The Kos at paragraph 74 that's {E/15/298} and Mr Justice Hamblen in the Orient−Express at paragraph 32, that's {E/31/928}. They are not,

therefore, a cause in any relevant sense of the insured's loss.

There are exceptions to that, my Lords. The best known exception that might arise is where both concurrent independent causes are covered under one policy, but neither satisfies the "but for" test on account of the other, or, as you know in tort, where two people each separately shoots a bullet and each bullet kills someone. These are exceptions. That's not this case.

My Lord, I should mention that the FCA have come up with a new and unknown category of cause which it calls an "intermediate category of interlinked concurrent causes": see the FCA respondent's case, paragraph 346 at {B/10/439}. Now, whilst of course novelty is not something necessarily to be discouraged at law, this particular category is not known, as far as I'm aware, to the law and, dare I say it, is not very coherent in them.

My Lord, one applies the "but for" test and one asks the question that the court below asked: whether there's cover in respect of pandemic where it can be said the key matters which led to business interruption, et cetera, wouldn't have happened even without the occurrence of COVID−19 within the specified radius? One

answers that no and that's the answer.

I'm not going to mention any of the cases cited by my learned friends, other than to say what they are, because neither of them is relevant Silver Cloud and McGhee, they're just not authorities of any relevant propositions to this case.

At the end of the day, my Lords, while the FCA might be able to prove covered notifiable disease, it cannot prove that it covered any BI loss and while it might be able to prove what caused the BI loss, it can't prove that that cause was covered.

Now I move to the counterfactual and Orient−Express. The FCA says that even if insurers are right on the construction of the insuring clause, in other words there is a radius of 25 miles, when you get to the stage of assessing the insurers indemnity and the applying the "but for" counterfactual, whether under the trends clause or otherwise you reverse out not just the proved cases of disease within 25 miles, but disease everywhere. In other words, you reverse more than the insured peril and it says that, my Lords, in its respondent's case at paragraphs 11.4, 38, and 356 that's {B/10/338}, {B/10/347} and {B/10/441}.

Now, that's not right, it's not even supported by the court below. Reversing only the insured peril

indemnifies the insured for loss caused by the insured peril. No more and no less. Reversing more than the insured peril impermissibly expands the scope of the insuring clause, and provides an indemnity for something that's not insured. Reversing less than the insured peril penalises the insured. The FCA's justifications just don't stand up.

It first asserts the inextricability of the disease within and outside the radius. I've already spoken about that. Secondly, it asserts that the counterfactual must be realistic and the counterfactual which reverses disease anywhere within the 25-mile radius is unrealistic. The answer to that is given by Mr Justice Hamblen in the Orient-Express. The purpose of the counterfactual is to give effect to the indemnity principle to reverse the insured peril. There's no rule that requires it to be realistic or not artificial. In fact, the FCA's own proposal that there's no COVID-19 anywhere in the UK, but exists everywhere else in the globe, is as unrealistic and artificial as they come.

Thirdly, the FCA repeats that it is impractical, even impossible, to assess insured's losses on the insurers' counterfactual. There's no basis for that submission, there's no evidence. In any event, it's dealt with, my Lords, at paragraph 97.4 of our

appellant's case at {B/7/242} also at Hiscox appellant's case at 72 to 76. That's {B/6/174} to {B/6/176}.

Anyway, I don't have time to deal with all this. If there are any difficulties of quantification, they simply have to be confronted just as the arbitral panel did in the Orient-Express, confronted, as it was, with difficult questions of assessment where one had to assume that the hotel was undamaged, but the entire city was devastated.

I now turn to the Orient-Express. It's addressed in considerable detail, my Lords, you will find that at our case at {B/7/244} to {B/7/252} and I can do very little to improve on it but, my Lords, the facts are well known. Your Lordships should go to the case itself and I think the case is at {E/31/921}. If your Lordships will forgive me, I'm just getting it out. One second.

The facts are well known, my Lords. Katrina and Rita devastated New Orleans. The Windsor Court Hotel suffered significant physical damage. Its owner, Orient-Express Hotels, had insurance against direct physical loss and damage except as excluded. In other words, it had all risks physical damage cover, and it also had insurance against business interruption loss directly arising from such physical damage.

The essential issue in that case was how the main

business interruption insuring clause should respond where the hurricanes had not only damaged the insured hotel, but had also devastated the wider area surrounding the hotel.

If your Lordships have that case in front of them, then you can turn to the policy and the terms at paragraphs 12 to 15. That's at page 923 {E/31/923}. The principal clauses of relevance are the following:

"(1) The policy's insuring clause:

"In consideration of the Insured ... paying the premium ... the Insurers ... agree ... to indemnify the Insured:

"(a) under the Material Damage and Machinery Breakdown Sections against direct physical loss destruction or damage except as excluded herein ..."

Ie, this is all-risks cover:

"... to Property as defined herein such loss destruction or damage being hereafter termed Damage."

My Lords, "Damage" was a defined term and it meant loss, destruction or damage which was not excluded, ie in the context of that case, it was loss, destruction or damage as caused by an included peril, namely hurricanes.

Then (b):

"Under the Business Interruption Section against

loss due to interruption or interference with the Business directly arising from Damage and as otherwise more specifically detailed herein."

And (2):

"The insuring clause at the head of the Business Interruption section said:

"'If any property owned used or otherwise the responsibility of the Insured for the purpose of or in the course of the Business suffers Damage as defined ..."

Et cetera.

"... and the Business be in consequence thereof interrupted or interfered with the Insurers will pay to the Insured the amount of the loss resulting from such Interruption in accordance with the provisions."

Can I invite your Lordships to read the trends clause, similar to our clause and similar to the clauses in all our policies, and your Lordships will see the reference to "but for the damage" towards the end of the trends clause.

When you've done that, if your Lordships could read paragraphs 13, 14, 15 and 16, you will see that there were two other clauses in the policy: the prevention of access clause and the loss of attraction clause, both of which responded to what had occurred and under which the

insurer paid the required indemnity because both of those clauses are talking about property in the vicinity of the insured location, in other words the hotel, being damaged. As the learned judge said at paragraph 16:

"Orient-Express Hotels has recovered an indemnity under the POA and LOA clauses, but this is subject to significantly lower limits than would be the case under the insuring clause."

Now, my Lords, the insured peril for the purposes of the material damage section was the fortuitous non-excluded event or cause. On the facts it was the hurricanes. If your Lordships go back to the policy at paragraph 12:

"The agreement was to indemnify the insured against damage except as excluded herein."

Under "business interruption", the peril was different. The peril under the business interruption section was its:

"Loss due to interruption or interference with the Business directly arising from Damage as otherwise more specifically detailed herein."

The insured peril was Damage and that is also reflected, as one would expect, in the trends clause, "but for the Damage."

If your Lordships go to paragraph, I think, 52 of

the judgment at page 931, that's {E/31/931}, to paragraph 52, in our respectful submission, the judge got it right and the court below in this case got it wrong.

Sixthly:

"OEH submits that the Generali's approach subverts first principles in that it involves seeking to strip out from the claim for the business interruption loss caused by insured damage, not merely the concurrent consequences of extraneous circumstances, but the concurrent consequences of the very peril that caused the damage which was a proximate cause of the business interruption loss in the first place."

In other words, only OEH was submitting that you have to strip out the hurricanes and all the damage caused by the hurricanes everywhere in New Orleans, and that's what you need to strip out. But the learned judge said:

"However, the relevant insured peril ..."

This is under BI:

"... is the damage, not the cause of that damage."

Similarly in our case, my Lords, we say that the relevant peril were the 25-mile radius cases of illness, not the cause of those cases of illness, not the pandemic outside.

The non-excluded fortuitous cause, ie the hurricanes, were not themselves the peril under the BI section, they were the cause of the peril. They weren't irrelevant to coverage, however, my Lords, they identified and defined what physical damage was insured. It had to be physical damage caused by non-excluded fortuitous causes. The perils under the property damage and under the business interruption section were not the same.

The tribunal's award quoted at paragraph 17 of the judgment at page 924 {E/31/924}, if your Lordships look at paragraph 15, this is the tribunal of which my Lord Lord Leggatt was a member:

"The issue arising on the construction of the policy is of fundamental importance to the approach to the Business Interruption claim, it had a major effect on the nature and quality of the evidence adduced.

"Expressed in summary terms, the issue is this: does the insuring clause of the policy provide cover, as OEH submits, for any and all losses suffered by the hotel as a result of the hurricanes and their effect, both on the city of New Orleans and in causing damage to the hotel, or does it provide cover as Generali submits only for the losses caused by the damage to the hotel itself but not, save for the other extensions, losses caused by

damage to and devastation of the city?

"If, for example, the consequence of the damage to the city but not to the hotel was a severe shortage of staff or a lack of demand for hotel accommodation, are those matters which Generali can deploy?"

Then, my Lords, you have paragraph 17 of the award there quoted. If your Lordships go to the end of paragraph 18 of the award {E/31/925}, that's at page 925, just above paragraph 19 of the award:

"The third question, in Mr Fletcher's formulation in opening submissions, was what is the loss resulting from interruption?

"It is the third question on which the parties part company. On behalf of Generali, Mr Picken QC submitted that the words are clear: the cause of the loss has to be and be shown by OEH to be interruption or interference resulting from the physical damage to the Hotel and not from the damage to the City of New Orleans or, say, want of demand ..."

Et cetera:

"Mr Fletcher did not, in the view of the Tribunal, ever supply a convincing answer to this submission. He criticised the submission as one creating a false hypothesis because the cause of the damage to the City and to the Hotel was the same event or events and he

submitted that the policy was intended to cover losses resulting from all damage caused by the events which damaged the Hotel and only to exclude losses resulting from damage which was completely unconnected in the sense that it had an independent cause. He submitted that the law relating to concurrent causes would in any event enable the Hotel to recover in circumstances where a given loss was caused both by Damage to the Hotel and the damage to the City. And he submitted that the effect of excluding losses resulting from damage to the City was to require an artificial and hypothetical enquiry to be made."

Very much like the submissions of the FCA in this case to be made.

"But none of these submissions in the view of the Tribunal address the language used in the provisions to which we have referred and which we have emphasised. The language requires OEH to establish that the cause of the loss claimed is the Damage to the Hotel. It is not necessary or relevant for this purpose to go behind the Damage and consider whether the event which caused the Damage also caused damage to other property ... the fact that there was other damage which resulted from the same cause does not bring the consequences of such damage within the scope of the cover."

My Lords, the tribunal goes on to say that in any event the language of the trends clause is conclusive of the subject.

Now, my Lords, that's exactly what we're doing in this case. This case, the FCA case. I want to move, my Lords, to, if I may, to paragraph 20 {E/31/926} of the judgment:

"Generali point out that the answer to the question of law raised is moot. The tribunal has not excluded recovery of losses concurrently caused by damage to the hotel and damage to the vicinity or consequent loss ... It has only excluded losses which would have been suffered in any event but for the damage to the hotel. Such losses are not to be regarded as caused in fact by the damage. At the hearing it became apparent that the crucial issue of law dividing the parties was the appropriateness of applying the 'but for' causation test in this case."

Now, in fact, my Lords, I should mention that the court below criticised my Lord Lord Hamblen for not focusing on the proximate cause. It is, dare I say it, not surprising ...

(No audio feed provided from the court)

"... submits that this is one of those 'very occasional' cases where fairness and reasonableness

require a relaxation in the standard."

And they referred to Kuwait.

My Lord, Lord Hamblen emphasised that the exceptions to the "but for" test are pretty exceptional. Paragraph 74, he says that:

"This may occur where more than one wrongdoer is involved. The classic example is where two persons independently search for the source of a gas leak."

Similar, my Lords, if I could say in that case if, for example, Orient–Express –– rather, the insurers in Orient–Express had said, "Ah, well, you haven't suffered a loss, a business interruption loss caused by damage because that loss would have been sustained in any event." When asked to indemnify under the POA or LOA clauses, the insurers would have said or could have said, "Well, you hadn't suffered a loss under those clauses because those clauses would have been suffered in any event as a result of damage to the hotel." The insurers in that instance would have been relying upon their own breach of contract in not preventing harm from occurring under the competing clauses and you can't rely upon your own breach of contract to avoid your liability. So if they had been asked, "Please pay under the damage clause, business interruption caused by damage", they would have said, "Ah, well, you would have

suffered loss in any event because of devastation all around the hotel". Then, if the insured had said, "Can you please indemnify in relation to the prevention of access or loss of attraction clause", the insurer couldn't have turned round and said, "Ah well, you hadn't suffered any loss under that because of the damage to the hotel, because the damage to the hotel caused you loss," the insurer would have been relying upon his own breach of contract in resisting liability under one or other of the clauses. In fact, Lord Hamblen dealt with that under the rubric of "absurdity" where he says:

"You can't do that because it would be absurd to allow the insurer to rely upon another clause and not pay out under that other clause."

My Lords, I transgress and I've got very limited time and what I need to do, my Lords, to deal with this case better is just rush a little bit and go to paragraph 29, if I could, {E/31/929}:

"Although OEH cannot point to any insurance or indeed contract case in which it has been held to be inappropriate to apply the "but for" test, it relies on the generally accepted principle that where there are two proximate causes of loss an insured can recover on the basis that it is sufficient that one of the causes

of the peril insured provided the other cause was not excluded: see The Miss Jay Jay. Whilst to date this has been a principle applied in respect of concurrent interdependent causes, OEH submits that it should be equally applied to concurrent independent causes."

My Lord, it wasn't and rightly so, my Lords. Those cases are not cases where one can recover because they are concurrent independent causes.

And if your Lordships go to the next paragraph which I need to take your Lordships to is —— if your Lordships could turn to paragraph 38 {E/31/929} where the learned judge dealt with the fairness and reasonableness, and this is important:

"Thirdly, in any event I am not satisfied that it has been shown that 'fairness and reasonableness' does require that the 'but for' test should not be applied. The tribunal, in accordance with the Trends clause, has adopted a 'but for' the damage to the hotel causation test as the basis of assessing the recoverable losses. If such a test is not adopted what is the alternative? One possibility would be 'but for the damage to the Hotel and the City' — ie an 'undamaged Hotel in an undamaged City' scenario. However, that would measure the gross operating profit which would have been made by OEH if the hurricanes had not struck at all and

would therefore compensate OEH for all business interruption losses howsoever caused, even where those losses were not in any way caused by damage (and as such are not recoverable under the main insuring clause of the policy)."

And that's exactly the answer to the FCA's case in this matter. It's not "but for" the 25—mile radius cases and COVID—19 everywhere else, which is what the FCA would like to say through some theory of indivisibility or proximate cause; it is "but for" the 25—mile radius cases. It's not "but for" the 25—mile radius cases and the cause of those cases, namely the epidemic or the pandemic even extending to China. It is "but for" the 25—mile radius cases. You don't add anything in to that insured peril in order to expand the scope and extent of the indemnity.

So, my Lords, that is the effect of that case. And if your Lordships would go to paragraph 46 {E/31/930} this is the wording of the clause, the trends clause:

"As to the wording of the clause, OEH submits that, even on a literal approach to the words 'had the Damage not occurred' or 'but for the Damage' ... Hurricanes Katrina and Rita ... could not have occurred either."

Now:

"... Hurricanes Katrina and Rita (which caused the damage) could not have occurred either. One cannot ignore the damage and yet pretend, for the purposes of the Trends clause, that the event which caused the damage still happened. However, this does not follow. The only assumption required by the clause is that the damage has not occurred. It doesn't require any assumption to be made as to the causes of the damage."

And then it says:

"Secondly, OEH submits that the Trends clause is dealing with the effect of real 'trends, variations or special circumstances' which either did affect the business or which would have affected the business, had the damage not occurred. It is dealing with the implications of actual events, not imaginary or hypothetical ones. The only permitted counterfactual is to assume that there was no insured damage and to ask what consequences these actual trends, variations or circumstances would have had. A hypothetical Rita or Katrina ... is not a 'special circumstance' which would have affected the business had there been no damage but an entirely fictional event."

Those were the submissions of the hotel:

"However, the clause requires a single assumption to be made (that there was no damage), and for the actual

facts to be considered on the basis of that assumption. That is what the tribunal have done."

Similarly, in our case. It doesn't matter how difficult it is, which it isn't. It doesn't matter how difficult it is, one reverses with a counterfactual all of the insured peril, but no more than the insured peril. There is a single assumption to be made, which is that there are no COVID—19 cases within 25 miles of the premises. That's not an artificial assumption. The Scilly Isles survived for months without a COVID—19 case. Bits of Northumbria didn't have any COVID—19 cases at the beginning.

"Thirdly", it says, paragraph 48:

"... OEH submits that the opening part of the Trends clause required adjustments to be made for 'the trend of the Business ... [et cetera] ... these words are looking at trends, variations or circumstances independent of the (insured) Damage."

This is just the same as the FCA's case:

"However, the trends, variations and circumstances considered by the Tribunal were independent of the insured Damage, albeit not independent of the cause of that Damage."

Similarly in our case. You look at trends and circumstances independent of the 25—mile cases but not

independent of the cause of those 25−mile cases.

Quite simply, my Lords, if in that case the insured had wanted business interruption cover from hurricanes, it could have asked for business interruption cover from hurricanes. In other words, business interruption losses caused by hurricanes. That's not what it asked for and that's not what it got. It got business interruption loss indemnity from damage, and that was all. Similarly, in our case.

If I could take your Lordships to −− I've taken your Lordships to paragraph 52, where we've got the insured peril, and then I want to go to 57 and 58 and then you'll be pleased to know that I have to be quiet otherwise I will be garrotted by my fellow insurers.

57, at page 931 {E/31/931}:

"I agree with the tribunal that the clause [that's the trends clause] is concerned only with the damage, not with the causes of the damage. What is covered are business interruption losses caused by damage, not business interruption losses caused by damage or 'other damage which resulted from the same cause'. Nowhere in the Trends clause does it state that 'variations or special circumstances affecting the Business either before or after the Damage or which would have affected the Business had the Damage not occurred' has to be

something completely unconnected with the damage in the sense that it had an independent cause to the cause of the damage. The assumption required to be made under the Trends clause is 'had the Damage not occurred'; not 'had the Damage and whatever event caused the Damage not occurred'."

So at 58 {E/31/932}, the learned judge says:

"I agree with Generali that OEH's construction effectively requires words to be read into the clause or for it to be re−drafted."

And then the last few lines:

"... [that] is inconsistent with the causation requirement of the main insuring clause which OEH accepts requires proof that the losses claimed were caused by damage to the hotel."

Now, translating that into our case −− I've already made the submission and then I'll be quiet. Translating that into our case, my Lords, that was a case of wide area damage. Our case is a case of wide area disease. That was a case of specific damage to a hotel. Our case is a case of supposed 25−mile COVID−19 cases. The only peril insured against in our case are COVID−19 cases within 25 miles. That's the only peril. If these insureds had wanted pandemic cover or epidemic cover on a national scale, then they didn't get it. And perhaps

they could have if they'd asked, I know not, but they didn't get it.

And what the court below has done and what the FCA seeks to achieve is that the business interruption losses which were caused by the national pandemic should be recoverable by the insured, even though the insured peril was confined to COVID−19 cases within 25 miles of the premises. That was the deal that was made and that's the bargain which has to be enforced by this court. As soon as you start messing around with things outside that perimeter or boundary, you are reverse engineering the contract of insurance, dare I say it, and you may be unduly −− and I'm sure you won't be −− influenced by the circumstances that we are considering this issue in the light of what has occurred over the last six to nine months. Whereas if you'd been asked this question a year ago, dare I say it, you would have had no hesitation in saying this is a case where the insured peril is 25−mile radius cases. Had those caused business interruption losses? The fact that there is some disease outside is an irrelevance. You can't reverse engineer those cases either through construction or through causation into the insured peril. No, FCA or insureds, we're awfully sorry but no.

And those, my Lords, are our submissions. I'm sorry to have shouted at you rather a lot recently.

LORD REED: Thank you very much, Mr Kealey.

We still have another quarter of an hour and so we'll turn next to counsel for Royal & Sun Alliance, Mr David Turner QC.

Submissions by MR TURNER

MR TURNER: My Lords, as you know, RSA brings an appeal in respect of two of the policies which were under consideration at first instance. Taking them in the order in which I'm going to deal with them, the first is the Cottagesure policy known as RSA1, and that's a policy which is specifically designed for the owners of holiday cottages. That policy includes a hybrid clause with a 25−mile radius disease provision. I was going to deal with it second because it's a hybrid clause but, given the time, it's better to take it first because I will be shorter on RSA1.

On RSA3, the Eaton Gate Commercial Combined policy, that is a policy which contains amongst other clauses a 25−mile radius disease clause, as well as an exclusion we say in respect of epidemic.

In terms of the points I'm going to make beyond preliminary points, I'll deal, as I've indicated, with RSA1 before RSA3.

Just in relation to causation, I should say that I adopt Mr Kealey's submissions in relation to "but for" causation and counterfactuals and the Orient−Express, and I adopt whatever Mr Crane and Mr Salzedo before him said in relation to causation.

I also adopt the submissions of Mr Crane and Mr Salzedo in relation to radius provisions generally, and I adopt prospectively Mr Lockey's submissions in relation to pre−trigger losses. I also adopt the submissions of those who have gone before in relation to the significance of the words "interruption or interference" in the context of the insured peril, adopting, if I may, also the approach taken by my Lord Lord Hamblen in the Orient−Express case, where those words were not seen to be integral to the insured peril but simply descriptive generally.

One further point on causation, you've been taken to paragraphs 111 and 112 which deal with indivisibility and each occurrence being an effective cause of the national restrictions. Can I just draw your attention to paragraph 418 of the judgment {C/3/149}. It's in the context of one of Hiscox's wordings, but this is where the Divisional Court seems to have provided a ruling which directly contradicted that which it had reached at paragraph 112 {C/3/69}, because in paragraph 418 the

Divisional Court said:

"... it cannot be said that any such localised incident of the disease ..."

That's an incidence of disease at that point within a one−mile radius:

"... caused the imposition by the government of the [national] restrictions."

And we say that that is correct and the approach that should have been adopted in relation to the other policies.

In relation to RSA1, by way of summary, this is a policy which provides disease cover only as an adjunct to primary business interruption cover, which itself is parasitic on insured material damage to the insured's property. The policy only responds to the consequences of a notifiable disease either at the premises or within the specified radius of the premises. Disease outside the specified radius is not part of the insured peril. This policy does not include a trends clause, but it does include quantification machinery in the form of a definition which I will take you to and the consequence is that the insured peril must be the sole cause of the loss.

Can I take you, then, to the relevant policy terms, and they are to be found in {C/15/1114}, starting at

page 1114. My Lords, they are summarised in our written case, which I should also have said I adopted, {B/9/29}, and the summary starts in appendix A at page 322 of bundle B {B/9/322}.

There is a one−document provision of the sort that Mr Kealey took you to in relation to his wordings which can be found on page 1118 {C/15/1118} of the policy. It's the third paragraph down. So everything to be construed as one document. The following page {C/15/1119} sees the start of the property damage section.

Business interruption insurance, the section starts at page 1125 {C/15/1125} and the insurance, the BI insurance, only applies where it is shown as included in the schedule.

Can I take you then to the schedule. And if we go to that at page 1195 {C/15/1195}, the schedule itself starts at page 1194 {C/15/1194}.

At {C/15/1195}, in respect of business interruption insurance, what is insured is loss of gross revenue. And "Loss of Gross Revenue" is itself a defined term and we see the definition for that at page {C/15/1186}. It's on the left−hand side of page 1186. It's:

"The actual amount of the reduction in the Gross Revenue received by You during the Indemnity Period

solely as a result of Damage to Buildings."

So this is the provision I was referring to which the learned judges said was part of the quantification machinery and so I can knock this point on the head.

In their judgment at paragraph 297, which is in {C/3/119}, what they said is that:

"... the contractual quantification machinery including the definition of Loss of Gross Revenue is intended to be applicable to heads of cover which do not involve physical damage and are to be read accordingly."

So, in other words, it was exactly the same manipulation of contractual language that they made in respect of the trends clauses where the trends clauses provided for physical damage, and no distinction to be made about the manipulation of language. And no point arises on this appeal that that manipulation should not be made in the context of RSA1 or, indeed, in respect of any of the other wordings that your Lordships are considering.

The business interruption insuring clause back in {C/15/1135}, in the right−hand column comes under a heading that would normally indicate that what being discussed is a basis of settlement clause, but in fact the heading itself is not particularly helpful because it's clearly setting out the insuring provision on the

right−hand side:

"If Damage by any Event covered under this Insurance occurs ..." et cetera "... and causes interruption ... We will pay ... the amount of loss resulting from the interruption or interference caused by the Damage ..."

There is, as you would expect, a material damage proviso which one finds on the following page {C/15/1136} in the right−hand column under the heading "Material Damage Requirement".

The key extensions are to be found at page {C/15/1129}, so back in time. "Extensions to cover":

"This insurance also covers ...

1 Failure of public supply ..."

So that's failure of supply effectively to the premises.

2 is the disease murder, suicide, vermin and pests provision which is in terms that you will have encountered in the other policies that you have already seen. So:

"Loss as a result of.

"A) closure or restrictions placed on the Premises as a result of notifiable human disease manifesting itself at the Premises or within a radius of 25 miles of the Premises."

And then a series of other clauses, which by now will be familiar to you: injury or illness; closure of the whole or part of the premises by order of the public authority as a result of defects in drains or sanitary arrangements; murder, rape or suicide at the premises; closure or restrictions on the premises as a result of vermin and pests at the premises.

Damage, as you would expect, is defined in the normal terms. I will just give you the reference. It's {C/15/1184}. I will not ask you to turn it up, but it's:

"Accidental loss, destruction or damage."

So dealing very quickly, if I may, with the scope of the peril, and asking you to keep page 1129 {C/15/1129} open, for present purposes only disease within 25 miles is relevant. I adopt with gratitude everything that's has been said before me in relation to that.

Your Lordships will see that what is covered is both disease or closure or restrictions as a result of a notifiable disease manifesting itself at the premises or within a radius of 25 miles of the premises. I adopt Mr Crane's submissions in relation to the present participle. The suggestion that is implicit in the FCA's submissions, given their acceptance that the "at the premises" part of this peril applies solely to the

consequences of disease at the premises rather than disease in the country, provided that it occurs at the premises, plainly the word "manifesting" cannot transform its meaning or form simply between the disease at the premises or the disease within the specified radius.

There is no scope, we say, for syntactical distinction to be drawn between "the 25−mile radius" provision and "at the premises" provision, and the FCA's concession in paragraph 194 therefore disposes of this particular point.

In terms of the required causal link, which is that there be disease within the specified radius which leads to closure or restrictions which leads to loss, we say that that causal links are plainly links of proximate causation throughout and that is the only sensible construction of the words "as a result of". Certainly those words would not admit of any distinction to be drawn between section 55 and the statutory presumption of a requirement for proximate causation, and the FCA has effectively conceded the point, as you're aware, in paragraph 219 of its own case in response at {B/10/401}.

They cannot have some looser causal link internally to the peril between the disease and the closure or restrictions than they have at the beginning of the

clause, the link between the loss and the peril, because it would be fanciful to suggest that those words somehow changed their meaning in the same clause, and I adopt Mr Salzedo's submissions in relation to that.

You already have my submissions in relation to the definition of "loss of gross" −− ah.

MR EDELMAN: My Lord, I just wanted to say that I've had a message from my solicitors saying I think the public link has gone silent. So −−

MR TURNER: Right.

MR EDELMAN: −− the solicitors and junior counsel listening to this may not be able to hear it on the public link.

MR TURNER: And indeed the transcript has stopped working as well, my Lords.

LORD REED: Yes.

MR TURNER: I'm pretty well at the end. I probably need 30 more seconds but, given the link's gone down, can I ask for those 30 seconds to be tomorrow morning.

LORD REED: There are probably all sorts of reasons why that's a good idea, Mr Turner.

Very well, then. We'll adjourn now and resume at 10.30 am tomorrow morning. Thank you.

MR TURNER: Thank you, my Lords.

(4.01 pm)

(The court adjourned until 10.30 am

on Tuesday, 17 November 2020)

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