



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

Day 1

July 20, 2020

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Phone: +44 (0)20 3008 5900

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

1

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

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

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

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1 deal with those when we get to the policies , but that is
2 the first topic .

3 I will then briefly deal with principles of
4 construction ; by and large , as one would expect,
5 uncontroversial but there are a few points that I will
6 want to make briefly . Then I will be dealing with
7 prevalence, again that will be relatively brief , before
8 we move on to the main topic for today, it may run over
9 into tomorrow but we will see about that, and the main
10 topic is , of course, the causation issues which have
11 been raised by the defendants. On that, Ms Mulcahy will
12 be dealing with the cases, but I will be saying
13 something about causation more generally before she
14 turns to the law. Then after she has finished with the
15 law on causation I will be saying something additional
16 about trends clauses and how they should be approached.

17 My Lords, that being the agenda for today before we
18 move on to the policies , I can tell my Lords the order
19 in which we will be dealing with them if it is helpful
20 now, but if not I will tell you tomorrow, with that
21 introduction I will hand over to Ms Mulcahy. I will put
22 my microphone on silent and I just remind all other
23 counsel that they should also keep their microphones on
24 silent when they are not speaking.

25 LORD JUSTICE FLAUX: Good morning, Ms Mulcahy.

5

1 (10.39 am)

2 Submissions by MS MULCAHY

3 MS MULCAHY: Good morning, my Lords.

4 I am going to outline the development of the
5 pandemic and then I am going to deal with the key
6 events, announcements and forms of public authority
7 action which will form the factual backdrop to the
8 issues of construction of the policies ; for example,
9 whether a particular step amounted to advice or to
10 action or to a restriction within the meaning of the
11 policies , whether it gave rise to a prevention of access
12 or a hindrance of use, whether it constituted or gave
13 rise to an interruption or an interference with the
14 insured business .

15 The factual background is also relevant to
16 considering the causation points on the counterfactual ;
17 for example, how divisible are the forms of public
18 authority action , and should some of them, but not all
19 of them, be excised when considering the "but for"
20 counterfactual ; do you just focus on the business
21 closure orders or the orders that can be said to fall
22 into that category, or some of them, or do you take
23 a broader view of the government action as a whole.

24 I am intending to take you to the key pieces of
25 advice and legislation and look at the documents, and

6

1 I will also introduce the different categories of
2 business which have been used for the purposes of the
3 assumed facts and show you their origins in the
4 legislation and announcements.

5 Those categories 1 to 7 are set out in the amended
6 particulars of claim at paragraph 19. Just for your
7 reference that is {A/2/13}, and they have been used by
8 all of the parties as a useful shorthand when
9 considering business types as they have been impacted
10 differently by different forms of public authority
11 action .

12 That is the reason for taking you to these
13 documents. I am going to be working from the agreed
14 facts bundle, agreed facts document 1, which is the
15 chronology of the government response to COVID-19 in the
16 UK, which I believe you may have in hard copy, it is
17 {C/1/1}. But I am also going to go to the accompanying
18 bundle, which I don't think you do have in hard copy,
19 but if you would like it and the legislation that I am
20 also going to go to, then we would be very happy to
21 provide with you a hard copy of that if you request it .

22 Can I start with the pandemic but looking at it
23 initially , and briefly , internationally .

24 The origin of the COVID-19 pandemic was towards the
25 end of last year with cases of pneumonia of unknown

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1 origin occurring in Wuhan, in Hubei Province in China.
2 On 31 December, New Year's Eve, 44 cases were reported
3 to the World Health Organisation. If we can bring up
4 the bundle {C/2/1} you will be able to see the
5 announcement of that there, referring to the number of
6 cases .

7 On 12 January 2020 it was announced that
8 a coronavirus had been found in samples taken from the
9 patients concerned and the associated disease was given
10 the name COVID-19.

11 On 30 January the World Health Organisation declared
12 there to be a public health emergency of international
13 concern. We can see that on {C/2/16} in the middle of
14 the page. You can see in bold it was declared that
15 there was a PHEIC, a Public Health Emergency of
16 International Concern.

17 On 11 March, which is at {C/2/107}, the World Health
18 Organisation declared COVID-19 to be a pandemic. And
19 a pandemic is defined by the WHO as the "worldwide
20 spread of a new disease" in contradistinction from the
21 an epidemic, which is defined as "an illness or
22 health-related behaviour or events which occur at the
23 level of a region or community in excess of normal
24 expectancy".

25 Those are the gist of the global pandemic. I am now

8

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

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

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

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

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

25 Then the first piece of legislation was enacted on

9

1 10 February. We have that in the legislation bundle,
2 it is {J/14/1} and these were the Health Protection
3 (Coronavirus) Regulations 2020. If we look at
4 regulation 3, which is over the page {J/14/2}, we can
5 see that they apply:

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

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

19 Moving on, on 22 February -- and this is back in
20 agreed facts 1, row 9, it is {C/1/5}, Scotland was the
21 first of the national administrations to make COVID-19
22 a notifiable disease. Five days later, on
23 29 February -- over the page, row 14 -- Northern Ireland
24 followed suit.

25 In between those dates, again if we just go back

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1 a page to row 10, on 25 February the government
2 instructed that travellers to the UK from certain
3 countries had to self-isolate even if they were showing
4 no symptoms, and also told employers and business, we
5 see at row 11 that they had to adopt certain practices,
6 for example in relation to hygiene and preventing
7 travellers from certain regions from attending work.

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

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

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

21 Interlinked with that spread there was further and
22 cumulative government action. If we go to {C/2/60}, on
23 3 March the government announced an action plan. If we
24 go forward two pages {C/2/62} to just see the index,
25 I don't need to go into this in detail, you will see

11

1 that it was dealing with the response, the phased
2 response to the pandemic -- not declared a pandemic as
3 yet, but to the disease, and the four phases were: to
4 contain, to delay, to research and to mitigate.

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

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

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

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

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

12

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

13

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

14

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

15

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

16

1 Whilst the figure is not agreed and the defendant
2 isn't being asked to determine the true prevalence, as
3 opposed to addressing certain issues on the assumption
4 that it represents the best available evidence, you will
5 see from the document on screen at 16 March {A/2/19}
6 that the Cambridge Public Health England analysis
7 estimates that by 16 March there were actually 391,000
8 cases spread across England.

9 In tandem and intertwined with the march of the
10 disease across the country, on 16 March the government
11 took further decisive preventative action, and did so by
12 way of a public announcement from the Prime Minister.
13 If we can go to that, it is {C/2/145}. I will take you
14 now to the series of announcements, just working through
15 what was said. You will see at the bottom of that page,
16 page 145, the Prime Minister saying:

17 "As we said last week, our objective is to delay and
18 flatten the peak of the epidemic by bringing forward the
19 right measures at the right time, so that we minimise
20 suffering and save lives. And everything we do is based
21 scrupulously on the best scientific advice."

22 Then over the page:

23 "Last week we asked everyone to stay at home if you
24 had one of two key symptoms: a high temperature or a new
25 and continuous cough.

17

1 "Today we need to go further, because according to
2 SAGE it looks as though we are now approaching the fast
3 growth part of the upward curve.

4 "And without drastic action cases could double every
5 or 6 days."

6 Then we have a series of steps:

7 "So, first, we need to ask you to ensure that if you
8 or anyone in your household has one of these two
9 symptoms, then you should stay at home for 14 days:

10 "That means that if possible you should not go out
11 even to buy food or essentials other than for exercise,
12 and in that case at a safe distance from others."

13 The next paragraph:

14 "And even if you don't have symptoms and if no one
15 in your household has symptoms there is more that we
16 need you to do now.

17 "So, second, now is the time for everyone to stop
18 non-essential contact with others and to stop all
19 unnecessary travel."

20 That is important in the context of the construction
21 issues that arise:

22 "We need people to start working from home where
23 they possibly can. And you should avoid pubs, clubs,
24 theatres and other such social venues."

25 If we carry on towards the bottom we have the words:

18

1 "So third, in a few days time -- by this coming
2 weekend -- it will be necessary to go further and to
3 ensure that those with the most serious health
4 conditions are largely shielded from social contact for
5 around 12 weeks."

6 Towards the bottom of that page:

7 "It is now clear that the peak of the epidemic is
8 coming faster in some parts of the country than in
9 others.

10 "And it looks as though London is now a few weeks
11 ahead."

12 At the top of the next page:

13 "... Londoners [should] now pay special attention to
14 what we are saying about avoiding non-essential contact,
15 and take particularly seriously the advice about working
16 from home ..."

17 Then we have advice and instruction relating to mass
18 gatherings, so the third paragraph:

19 "But obviously, logically as we advise against
20 unnecessary social contact of all kinds, it is right
21 that we should extend this advice to mass gatherings as
22 well.

23 "And so we've also got to ensure that we have the
24 critical workers we need, that might otherwise be
25 deployed at those gatherings, to deal with this

19

1 emergency.

2 "So from tomorrow, we will no longer be supporting
3 mass gatherings with emergency workers in the way that
4 we normally do. So mass gatherings, we are now moving
5 emphatically away from."

6 So we have a series of announcements there trying to
7 delay the epidemic, telling people to stay at home, stay
8 at home with symptoms, to stop non-essential contact and
9 travel, to work from home.

10 LORD JUSTICE FLAUX: What day of the week was 16 March? Was
11 it a Tuesday?

12 MS MULCAHY: It was a Monday, my Lord.

13 LORD JUSTICE FLAUX: It was a Monday, was it?

14 MS MULCAHY: It was a Monday.

15 LORD JUSTICE FLAUX: Monday, was that the week of the
16 football match? It was certainly the week of
17 Cheltenham, wasn't it, or was it the week before?

18 Perhaps it was the week before.

19 MS MULCAHY: I think it may have been the week before.

20 LORD JUSTICE FLAUX: I think it may have been the week
21 before. Yes, it was. Thank you.

22 MS MULCAHY: Then we have this prohibition on mass
23 gatherings. What we would say about this is clearly
24 this was a national strategy trying to deal with
25 a national emergency.

20

1 We have on the same date, and it is page 139
 2 {C/2/139} in this bundle, so slightly earlier, but on
 3 the same date the government is issuing further specific
 4 guidance on social distancing and on what vulnerable
 5 people need to do.
 6 We say 16 March is significant in this case because
 7 it would appear to be a key turning point in behaviour.
 8 You will have noted the imperative language that was
 9 used in the Prime Minister's announcement, and we say
 10 that this was part of the government action or advice
 11 within the meaning of the wordings, and that this and
 12 the subsequent social distancing advice and instruction
 13 amounted to prevention of access, hindrance of use,
 14 closure, interruption, et cetera.
 15 It is 16 March that is the first action that the FCA
 16 is relying on as triggering all those clauses; that is
 17 paragraph 69 of its skeleton at {1/131} but we don't
 18 need to go to it.
 19 We can see that the following day the Chancellor
 20 announced a package of financial support for businesses,
 21 and it is at page 168 of this bundle, including
 22 £330 billion worth of guarantees {C/2/168}. That was
 23 following on from a package of £30 billion the previous week, so
 24 one can see that the government was anticipating the economic
 25 impact.

21

1 If we go over the page to {C/2/169} those measures
 2 are set out and it is made clear that they are seeking
 3 to support businesses and that the economic response is
 4 directed at giving government-backed guaranteed loans to
 5 support businesses to get through this.
 6 I am going to move on now to further UK Government
 7 action.
 8 I'm sorry, I think I had it the wrong way round.
 9 I am told the Cheltenham Gold Cup was on 13 March,
 10 my Lord, so it was the previous week.
 11 Moving on now to what happened after 16 March, we
 12 have a further announcement on 18 March, it is page 221
 13 of this bundle {C/2/221}.
 14 In this announcement, can we go over to the second
 15 page of it, {C/2/222} the Prime Minister is reiterating
 16 advice to stay at home and work at home but is also
 17 taking further action. If I start at the top, he
 18 stated:
 19 "I want to repeat that everyone -- everyone -- must
 20 follow the advice to protect themselves and their
 21 families, but also -- more importantly -- to protect the
 22 wider public. So stay at home for seven days if you
 23 think you have the symptoms."
 24 A reminder of what the key symptoms were, and then
 25 in the next paragraph:

22

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

23

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

24

1 The next day, 19 March, which is the Thursday of
2 that week, the coronavirus bill was returned through
3 parliament on an emergency basis, including measures to
4 contain and slow the virus. It is a long Act, we don't
5 need to go to much of it, but I will show that you in
6 a moment.

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

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

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

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

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

25

1 Towards the bottom, the penultimate paragraph:

2 "I must be absolutely clear with you: the speed of
3 that eventual recovery depends on our ability, our
4 collective ability, to get on top of the virus now."

5 Then we have further action over the page, fourth
6 paragraph:

7 "We are collectively telling, telling cafes, pubs,
8 bars, restaurants to close tonight ..."

9 So this is on 20 March, the Friday:

10 "... as soon as they reasonably can, and not to open
11 tomorrow.

12 "Though to be clear, they can continue to provide
13 take-out services.

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

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

21 "And I want to stress that we will review the
22 situation each month to see if we can relax any of these
23 measures."

24 Then skipping two paragraphs:

25 "So that's why, as far as possible, we want you to

26

1 stay at home ..."

2 That's what was said on 20 March. The UK Government
3 is continuing to shut down individuals and businesses in
4 their activities. Here, as we will see when we get to
5 the categories, we have category 1 businesses, cafes,
6 pubs, bars, restaurants, other than take-out, and
7 category 2, clubs, theatres, cinemas, et cetera being
8 affected. And RSA, for example, accepts this
9 announcement and this order to close as closure of these
10 businesses; it is paragraph 40(e) of its defence.

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

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

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

27

1 If we go back to regulation 2, it is on
2 page {J/15/2} of that document, it is headed
3 "Requirement to close premises and businesses during the
4 emergency", and we can see that:

5 "A person who is responsible for carrying
6 on a business, which is listed in part 1 of the schedule
7 ..."

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

9 "A 'person responsible for carrying on a business'
10 includes the owner, proprietor, and manager of that
11 business."

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

20 And at 4, regulation 2(4), I will move to the
21 schedule in a moment, that relates to part 1 of the
22 schedule:

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

28

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

1 a Sunday, 22 March, and if I can go over the page to
 2 {C/2/265} we can see towards the top the Prime Minister
 3 thanking everyone who didn't visit their mother on
 4 Mother's Day and then he says:
 5 "Everyone who was forced to close a pub or a
 6 restaurant or a gym or any other business that could
 7 have done fantastic business on a great day like this.
 8 "Thank you for your sacrifice. I know how tough it
 9 must be."
 10 Then skipping a paragraph he says:
 11 "The reason we are taking these unprecedented
 12 measures to prop up businesses, superior businesses and
 13 support our economy and these preventative measures is
 14 because we have to slow the spread of the disease and to
 15 save thousands of lives."
 16 Then he sets out the stage of the plan he advertised
 17 at the outset:
 18 "We have to take special steps to protect the
 19 particularly vulnerable."
 20 And states there are probably about 1.5 million in
 21 all, and then says:
 22 "But this shielding [which is the protection of the
 23 vulnerable] will do more than any other single measure
 24 that we are setting out to save life. That is what we
 25 want to do."

1 So that deals with the fact of shielding. We have
 2 a reminder that "tomorrow", [which is the Monday, the
 3 23rd], "you should not send your child to school unless
 4 you have been identified as a key worker." Then towards
 5 the bottom:
 6 "You have to stay two metres apart; you have to
 7 follow the social distancing advice."
 8 Then he says this:
 9 "I say this now -- on Sunday evening -- take this
 10 advice seriously, follow it, because it is absolutely
 11 crucial."
 12 Then at the bottom:
 13 "... we will keep the implementation of these
 14 measures under constant review ..."
 15 Over the page {C/2/266}:
 16 "You are doing your bit in following this advice to
 17 slow the spread of this disease."
 18 The following day, 23 March, the same theme
 19 continues, it is page {C/2/290}:
 20 "The coronavirus is the biggest threat this country
 21 has faced for decades ..."
 22 Then he goes on over the page:
 23 "Without a huge national effort to halt the growth
 24 of this virus, there will come a moment when no health
 25 service in the world could possibly cope ..."

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

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

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

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

35

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

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

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

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

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

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

1 broadcast an act of worship and to provide essential
 2 voluntary services.
 3 So that is category 7 in relation to churches. We
 4 have also put schools into that category, but schools
 5 are not dealt with in these regulations. We have seen
 6 the announcement of 18 March requiring schools to be
 7 closed, and the position in relation to schools is that
 8 there was power to close them provided in the
 9 Coronavirus Act, it is at {J/13/25}, sections 37 and 38
 10 and schedules 16 and 17 to that Act. See at the bottom
 11 there "temporary closure of educational institutions"
 12 and schedule 16 and 17, which is {J/13/157} and 176, we
 13 don't need to go to them. Those powers were not
 14 exercised, but there was a power to close them.
 15 Ecclesiastical and Amlin, in their skeleton, say
 16 that schools were first directly subject to legally
 17 restrictive regulations on 1 June 2020. We say that
 18 there was this impact of the threat of legislative
 19 interference by the Coronavirus Act itself on this much
 20 earlier date.
 21 If I can go back now to the 26 March regulations at
 22 {J/16/4} and look at regulation 6, which imposed
 23 restrictions on the movement of individuals. It is made
 24 clear there:
 25 "During the emergency period no person may leave the

1 place where they are living without reasonable excuse."
 2 Then the reasonable excuses are identified there,
 3 including the need to obtain basic necessities,
 4 exercise, seek medical assistance, provide care
 5 assistance, donate blood. Then (f) is important:
 6 "To travel for the purposes of work or to provide
 7 voluntary or charitable services, where it is not
 8 reasonably possible for that person to work, or to
 9 provide those services, from the place where they are
 10 living."
 11 There are some other further exceptions over the
 12 page.
 13 Now, that needs to be read obviously with the
 14 government announcement on 23 March. You must only go
 15 to work if "it is absolutely necessary".
 16 Then we can see here at (i) accessing critical
 17 services, including childcare or educational facilities,
 18 where these are still available to a child in relation
 19 to whom that person is the parent.
 20 So we would say that these are the exception, not
 21 the rule, in relation to the ability to travel for work
 22 and to go to the premises where you work. If you could
 23 work from home, you had to work from home.
 24 Regulation 7 restricts gatherings:
 25 "During the emergency period no person may

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

1 individuals and businesses. We would say that this is
2 all two sides of the same coin. If you are telling
3 people on the one hand to stay away from businesses, and
4 you are closing the business on the other, we would say
5 that is one and the same thing; the purpose is to
6 prevent access to those businesses, even if it is for
7 the ultimate purpose of protecting public health.

8 We would say from the beginning, the danger and
9 emergency of COVID-19 posed a national threat. It
10 spread nationally and it required an elicited national
11 response; and at each stage, one can see from these
12 announcement and the regulations, the government is
13 acting on the basis of emergency, danger and health
14 concerns. The restrictions prevented activity on the
15 part of individuals and businesses in combination,
16 collectively causing losses. That's why we contend that
17 the disease and public authority action and the specific
18 types of public authority action form an indivisible
19 whole.

20 As the Secretary of State for Health said later, on
21 28 April -- can we go to {C/1/36} and it is the 28 April
22 row in AF1, it is at the bottom -- the lockdown was
23 imposed at the same time across the whole of the UK for
24 this reason:

25 "There was a big benefit, I think, as we brought in

1 the lockdown measures, of the whole country moving
2 together. We did think about moving with London and the
3 Midlands first, because they were more advanced in terms
4 of the number of cases, but we decided that we are
5 really in this together, and the shape of the curve, if
6 not the height of the curve, has been very similar
7 across the whole country. It went up more in London but
8 it's also come down more, but the broad shape has been
9 similar, which is what you would expect given that we
10 have all been living through the same lockdown measures.
11 The other thing to say is that it is not just about the
12 level, it is also about the slope of the curve and if
13 the R [which is the doubling rate] goes above 1
14 anywhere, that would eventually lead to an exponential
15 rise and a second peak and an overwhelming of the NHS in
16 that area unless it's addressed, so although the level
17 of the number of cases is different in different parts,
18 the slope of the curve has actually been remarkably [if
19 we can go over the page to page 37 please] similar
20 across the country, so that argues for doing things as
21 a whole country together."

22 That was the basis on which this was a national
23 lockdown. I will come on to the local lockdown in
24 Leicester in a little bit. But under the March
25 regulations the government could disapply any lockdown

1 measure at any stage, it had to positively review them
2 every three weeks, which it did, but it nonetheless
3 continued that national lockdown until recently, when it
4 started to lift the lockdown and apply more limited
5 measures, such as to Leicester.

6 I have a little bit more to deal with on this topic,
7 I am just wondering whether that might be a convenient
8 moment for the shorthand writers to have a break, and
9 then I will finish off this topic and deal with common
10 triggers before handing back to Mr Edelman.

11 LORD JUSTICE FLAUX: How long a break do you want, five or
12 ten minutes?

13 MS MULCAHY: I am in your hands, my Lord.

14 LORD JUSTICE FLAUX: Because we are dealing with things
15 remotely, my watch says it is just before quarter to 12,
16 if we say just after 10 to 12, so that gives us sort of
17 seven or eight minutes. Okay?

18 MS MULCAHY: Yes, thank you very much.

19 LORD JUSTICE FLAUX: Okay, see you in a second.

20 MS MULCAHY: Yes.

21 (11.43 am)

(Short break)

23 (11.52 am)

24 LORD JUSTICE FLAUX: Are you ready, Ms Mulcahy?

25 MS MULCAHY: Yes, my Lord.

1 Much is made by the defendants of whether something
2 is mandatory, in the sense of legal enactments that are
3 enforceable and legally binding. However, it has to be
4 remembered that there was a legal underpinning to all of
5 the government's requirements whether or not they were
6 specifically legislated for, and this is also relevant
7 to the businesses which remained even partially open, of
8 which there were very few. This is because all
9 businesses had legal duties as employers and occupiers,
10 such as tortious duties of care, duties under the health
11 and safety legislation, contractual duties under
12 employment contracts; and those duties were owed to
13 employees, they were owed to customers, they were owed
14 to contractors and to other visitors. They included, in
15 relation to employers, the need to ensure so far as
16 reasonably practicable the health and safety at work of
17 employees through implementation of a safe system of
18 work.

19 So we would say it wasn't open to policyholders to
20 breach the UK Government's advice and guidance without
21 risking a breach of their legal duties regarding the
22 health and safety of employees, and as occupiers in
23 relation to the public.

24 These duties, in combination with the requirements
25 to avoid unnecessary travel, self-isolation and the two

1 metre rule, made it impracticable for many businesses to
2 function, even if in law they could remain open or
3 partially open.

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

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

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

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

23 Then you will take "all reasonable precautions to
24 prevent" -- this is on page {B/2/65} at 2 -- "accident
25 or injury to any person". Then at (c) "comply with all

1 legal requirements and safety regulations and conduct
2 the business in a lawful manner".

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

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

1 orders to close premises.

2 Just to briefly address some of the points that are
3 made by the insurers in their skeletons, the public
4 authority response was not just to reduce the number of
5 people mixing, and to promote social distancing, as for
6 example Zurich suggests; it was to prevent, to the
7 greatest extent possible, people of different households
8 from being physically together in the same place.

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

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

25 Exceptionally, a few types of businesses stayed open

1 for absolutely essential services, chiefly food and
2 health, but even they had to comply with social
3 distancing and employers' duties, which would restrict
4 activity. All non-essential shops selling goods,
5 department stores, et cetera, had to close, except to do
6 online and telephone orders.

7 Most people could not access those places due to the
8 restrictions on individual movement and the restrictions
9 on the businesses.

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

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

1 reflect reality to suggest otherwise.
 2 So far as the restrictions on movement are
 3 concerned, they were directed at preventing access to
 4 particular premises, in fact most premises. People
 5 could only leave home in very rare circumstances, and it
 6 is just misrepresentative of the position for the
 7 defendants to suggest, as Ecclesiastical /Amlin do in
 8 their skeleton, that home working was encouraged where
 9 people could possibly work from home. It wasn't
 10 "encouraged"; it was required unless it was not
 11 reasonably possible to do so.

12 So we would say that the regulations did order many
 13 owners and employees not to access premises for their
 14 work. And this was all part of an indivisible and
 15 interlinked strategy. It wasn't piecemeal and it wasn't
 16 merely advisory; all aspects of the public authority
 17 response were targeting individuals and businesses in
 18 combination cumulatively over time, and culminating in
 19 26 March regulations. The language was imperative, and
 20 we say it wasn't merely advisory, it wasn't a matter of
 21 choice.

22 Finally on this topic, in relation to the
 23 defendants' reliance on the Leicester lockdown, which is
 24 relied on by Ecclesiastical /Amlin, for example, at
 25 paragraph 26.11 of their skeleton, the fact that the UK

1 Government moved recently to implement a local lockdown
 2 we would say underscores the fact that it implemented
 3 a national lockdown in March.

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

17 That's what I wanted to say about the pandemic and
 18 about public authority action. I am going to just
 19 briefly address a couple of matters that interrelate
 20 with the issues I have just been covering, which are
 21 types of public authority action and disease policy
 22 triggers. They are addressed in our skeleton starting
 23 at paragraph 103 onwards, which is at {1/1/44}. The
 24 rest of the issues as to the meaning of "imposed" or
 25 "prevention of access" or "interruption" will be

1 addressed in the context of the specific insurer policy
 2 wordings. It is really more to tell you what is in
 3 issue and what is not in issue than anything else at
 4 this stage.

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

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

23 The FCA relies on that as supporting the case that
 24 these wordings were contemplating the sorts of wide area
 25 disease, dangers or emergencies that would be likely to

1 engage a government's response. Some explicitly refer
 2 to government, others include government, but they are
 3 all contemplating an outbreak of infectious disease or
 4 emergency or similar that engages the government, and
 5 that will be an important point when construing the
 6 policies and whether they would be expected to
 7 cover wide area disease.

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

15 So apart from in one respect, it is agreed that all
 16 the public authority clauses relied upon cover UK
 17 Government action.

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

23 Now, Amlin admits that the UK Government and
 24 parliament are a competent local civil or military
 25 authority if and when exercising authority over the

1 location of the premises; that is paragraph 50 of their
 2 defence. But Zurich disputes it, on the basis that
 3 there is no reference to "government" in the clause, and
 4 if the parties had intended cover to attach to the
 5 actions of government they would have said so. They
 6 contend that a "civil authority" is a reference, in
 7 effect, to the Health & Safety Executive or the Civil
 8 Aviation Authority or the Fire Service, but does not
 9 encompass national government.

10 Now, we say Zurich is wrong not to admit this, and
 11 the FCA and Amlyn are right. But I am not going to
 12 argue about that now; we will address it in more detail
 13 when we consider Zurich, as the issue only affects its
 14 wordings.

15 The second part of looking at types of policy --
 16 LORD JUSTICE FLAUX: The Health and Safety Executive is a
 17 governmental body, is it not?

18 MS MULCAHY: It is a governmental body.

19 LORD JUSTICE FLAUX: It's not an NGO or something of that
 20 kind; it is an arm of government.

21 MS MULCAHY: It is. The point that Zurich is making is that
 22 its body is below national government. So the
 23 government itself and parliament would not form within
 24 that. It would have to be bodies below that level. But
 25 as I said --

1 LORD JUSTICE FLAUX: We will hear that argument in due
 2 course.

3 MS MULCAHY: It will be argued in due course.

4 LORD JUSTICE FLAUX: I am currently unconvinced by that
 5 point.

6 MS MULCAHY: The second point is action or advice. A number
 7 of the policies require action or advice by the relevant
 8 public authority. We rely on the actions that have
 9 previously been discussed, but starting from
 10 16 March 2020. So we list the actions we rely on in our
 11 skeleton at paragraph 69, which, so you have the
 12 reference, is {1/1/31}.

13 Arch, for example, and RSA2 and RSA4, require action
 14 or advice. Arch does not dispute that any of the
 15 relevant government actions relied upon by the FCA fell
 16 within that definition.

17 By contrast, RSA denies that certain matters were
 18 actions or advice, and in its skeleton it only admits
 19 that government orders that premises should close, which
 20 it describes or names the closure measures, and the
 21 instructions as to social distancing and staying at
 22 home, which it calls "the social distancing measures",
 23 are all action or advice. And it says everything else
 24 is not.

25 We don't need to concern ourselves with anything

1 before 16 March, because it is not being relied on by
 2 the FCA as having relevant interrupting effects. But
 3 there is an issue there, as to the status of, for
 4 example, the Coronavirus Act, the designation of
 5 specified authorities to enforce the regulations, the
 6 extension of restrictions on 16 April, et cetera, that
 7 seems to be in dispute.

8 There are some other policies that just refer to
 9 "action", i.e. it is not action or advice, it is just
 10 action, being Ecclesiastical, Amlyn 1 and 3 and the two
 11 Zurich policies, and there is a difference again of
 12 approach between the defendants.

13 Ecclesiastical appears to accept that advice,
 14 instructions, guidelines, announcements, as well as
 15 legislation, in relation to churches all amount to
 16 action, and that appears to be confirmed by
 17 Ecclesiastical's skeleton argument at
 18 paragraph 120.4(c). So they would appear to be
 19 conceding that the government instruction on 23 March,
 20 that places of worship should close immediately, was
 21 action.

22 Amlyn also appears to accept that advice,
 23 instructions, announcements and legislation were
 24 actions, and that is confirmed in its skeleton at
 25 paragraph 135.2. It says:

1 "The government acted when it issued advice or
 2 guidance and also when it made regulations."

3 That is the FCA's case.

4 Only Zurich argues that "action" does not include
 5 advice or guidance. It says that in its defence at
 6 paragraph 39.2(a). The sole reason appears to be
 7 because the clause does not say so; and that position is
 8 maintained by Zurich in its skeleton. Again, because it
 9 is the only insurer arguing this, we will address that
 10 when we come to Zurich, rather than taking up time with
 11 it now.

12 But the FCA's case is that in the context of public
 13 authority action, action and advice is overlapping, and
 14 that giving advice is an action, it is a thing, an act
 15 or thing done.

16 That's all I wanted to say at the moment, simply to
 17 identify what is in issue and with whom.

18 The final point is on COVID-19 and fulfilling
 19 disease requirements. You will see from the list of
 20 issues at paragraph 1, which is at {A/15/1}, it is
 21 common ground that COVID-19 fulfills the various disease
 22 requirements which are specified by ensuring provisions
 23 triggered by disease, including that it became
 24 a qualifying notifiable disease within the meaning of
 25 the various different wordings to that effect in England

1 on 5 March, on 6 March in Wales, and on those relevant
2 dates in other parts of the UK. And the FCA in this
3 claim is not seeking to establish a trigger prior to the
4 disease becoming notifiable under the UK legislation.

5 All I want to do for present purposes, and it is
6 really as a matter of context when you are construing
7 the policies, is just to note what this means, ie what
8 it means for a disease to be a notifiable disease. It
9 means for England it is one of the now 33 diseases on
10 a list, the discovery of which triggers statutory
11 obligations on doctors, on hospitals, on laboratories
12 and local authorities to report the case of notifiable
13 disease, or such an infectious agent. The local
14 authorities have to report to national bodies, to the
15 health protection authority, to Public Health England.

16 Just to take you to the regulations relating to that
17 at {J/11/11}, the explanatory note to the Health
18 Protection (Notification) Regulations 2010, which
19 provide the basis on which diseases can become
20 notifiable, one can see there in the first paragraph
21 that they place obligations on various persons to
22 disclose information to specified third parties for the
23 purposes of "preventing, protecting against, controlling
24 or providing a public health response to the incidence
25 or spread of infection or contamination".

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1 So it is a public health response. These are
2 infectious diseases which might spread and might lead to
3 a public health response. The list on that date, to
4 which COVID was added this year, is at page 8 of that
5 document. Again, it is probably worth just to look to
6 see the types of diseases that are being referred to.
7 You will see there it includes cholera, malaria, plague,
8 it includes I think SARS, smallpox, TB, et cetera.

9 It is agreed between the parties, it is {C/9/2},
10 Agreed Facts 5, that these are epidemic, endemic or
11 infectious diseases, as stated in the Public Health
12 (Control of Diseases) Act 1984, which is the enabling
13 Act for the making of these regulations in 2010. As
14 I said, the regulations have been amended this year to
15 add COVID-19 and the virus SARS-CoV-2 to the list of
16 notifiable diseases and causative agents. But all of
17 the disease clauses referring to notifiable diseases are
18 anticipating this sort of infectious disease.

19 I am going to hand back now to Mr Edelman. Thank
20 you.

(12.13 pm)

Submissions by MR EDELMAN

LORD JUSTICE FLAUX: Yes, Mr Edelman.

24 MR EDELMAN: My Lords, can I just add one final comment to
25 what Ms Mulcahy has said, and it arises in relation also

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1 to defendants' argument about prevention, and whether
2 what the government said insofar as it wasn't
3 legislatively prohibited is prohibitive, and that is
4 this:

5 In times of emergency and crisis, the public
6 understands the difference between what the government
7 was telling them to do in March of this year, and
8 exhortations like to eat more fruit and vegetables and
9 drink less alcohol. Behind the government's
10 announcement telling people what they must do was an
11 appeal to comply voluntarily in order to avoid or minimise
12 the government being forced to invoke the law. I want
13 to say the fact that in a free society governments
14 impose their will in this way, rather than operating as
15 if this was a Police State, is what marks us out as
16 society where people realise that freedom comes with
17 social responsibility. Insurance policies should be
18 construed and applied in that context and not as if they
19 were being pored over, as Mr Kealey would have it, by
20 constitutional and human rights lawyers.

21 My Lords, the next topic is principles of
22 construction, and I can be very brief about this.

23 Firstly, a few words about Chartbrook. It doesn't
24 give the court free rein to rewrite contracts. The
25 obviousness of an error is not to be judged from

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1 insurers' perspective, particularly so where the claimed
2 errors were the benefit of hindsight. The error must be
3 one which would have been obvious to a reasonable reader
4 without reference to events which occur after the
5 contract had been entered into, and it must also be
6 clear to the reasonable reader what correction to the
7 language is necessary.

8 MR JUSTICE BUTCHER: Mr Edelman, this is just RSA, is it?

9 MR EDELMAN: My Lord, it does come in also with other
10 insurers who say that, for example, their trends clauses
11 ought to be read differently and so on. Where they say
12 it is an obvious mistake not to apply our trends clause
13 to something other than damage.

14 LORD JUSTICE FLAUX: There is a difference, isn't there,
15 between the sort of RSA point and the trends clause
16 point? Because the trends clause point, in essence what
17 is being said is: look, these business interruption
18 insurances can only operate sensibly if there is
19 a contractual machinery for calculation of loss, of
20 which the trends clause forms a part. And they say: if
21 we haven't said that "damage" includes all the insured
22 perils, including non-damaged things, that has sensibly
23 to be the construction the court should put on it,
24 because otherwise there isn't a contractual mechanism.
25 How do you actually calculate your loss?

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1 I mean, that is the argument.
 2 MR EDELMAN: That is the argument, but if it's calculable --
 3 LORD JUSTICE FLAUX: Qualitatively it's a different sort of
 4 argument.
 5 MR EDELMAN: It is, but it does require correction to the
 6 policy, in the sense that the language as it stands --
 7 LORD JUSTICE FLAUX: Yes, but correction that falls short of
 8 rectification .
 9 MR EDELMAN: Absolutely. That is why I mentioned
 10 Chartbrook.
 11 LORD JUSTICE FLAUX: Yes. Well, Chartbrook is a bit of
 12 a busted flush when it comes to rectification .
 13 MR EDELMAN: It is not rectification, that is --
 14 LORD JUSTICE FLAUX: No, it's all right, I'm only just
 15 making the point that ...
 16 MR EDELMAN: Yes.
 17 Contra proferentem. Not a lot to say about this,
 18 I think it is common ground. When the proferens relies
 19 on wording which is genuinely capable of two meanings,
 20 and the intended meaning cannot reliably be discerned by
 21 any other contextual factors, the court is entitled and
 22 bound to construe against the proferens.
 23 I hope that is uncontroversial. That is the only
 24 reliance we intend to place on contra proferentem, but
 25 that is it.

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1 Then one more topic on which I want to say a little
 2 bit more, which is the factual matrix point made by
 3 insurers. It is in the skeleton on construction at
 4 {1/5/5}. If we could have that up, please. It is their
 5 reliance on The Kleovoulos of Rhodes for the proposition
 6 that Orient-Express is settled law, and that policies
 7 should be construed against that background.
 8 Having recently had to argue about the case and the
 9 clause considered in The Kleovoulos of Rhodes in The
 10 B Atlantic, I think it is important to put some context
 11 on what Lord Justice Clarke was dealing with in that
 12 case and what he said.
 13 Firstly, as my Lords will know, it concerned
 14 a standard Institute marine insurance clause for
 15 worldwide use.
 16 Secondly, the Court of Appeal decision on the
 17 clause, The Anita, dated back to 1971.
 18 Thirdly, and if we go to {K/111/10}, please, at
 19 paragraph 45 in the second column, you will see that in
 20 the judgment of Lord Justice Clarke as he then was, he
 21 refers to the fact that Arnould on Marine Insurance in
 22 1981 had treated the clause as having a settled meaning,
 23 and he noted the authors were then Sir Michael Mustill
 24 and Mr Jonathan Gilman, and also notes that the
 25 Institute clauses were reviewed in 1983 and the relevant

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1 words were left unchanged. That is in the light of The
 2 Anita having been decided in 1971.
 3 Then in paragraph 46 he moves on to recite the fact
 4 that Arnould treated the clause as having a settled
 5 meaning, taking into account also the review of the
 6 clauses that there had been, and that is paragraph 46.
 7 Then The Kleovoulos of Rhodes itself, the judgment
 8 is in 2003, that is 32 years after the previous decision
 9 of the Court of Appeal on the point, and with the
 10 meaning of the clause having been treated as settled by
 11 distinguished authors of the leading text on marine
 12 insurance and by those responsible for reviewing it in
 13 1983 in the context of its international use.
 14 It is also important to bear in mind the test that
 15 the court applied, at paragraph 44 in column 1 of the
 16 page that is on the screen:
 17 "So I turn briefly to the question of whether the
 18 meaning of clause 4.15 should be regarded as settled."
 19 And he refers to Re Hooley Hill Rubber.
 20 If we could go back to paragraph 27, that is on
 21 page 8, please {K/111/8}, and you will see in
 22 paragraph 27 there is a quotation from Hooley Hill
 23 Rubber in the middle of the paragraph, and that was
 24 referring to a decision, Stanley v Western, it is in
 25 fact a decision in 1868, which had stood for 50 years,

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1 and that was the sort of decision that was being
 2 considered in Hooley Hill Rubber, which
 3 Lord Justice Clarke considered himself to be applying
 4 when he went on to conclude that the meaning of the
 5 clause was a matter of settled law.
 6 Insofar as this is intended, as it appears to be, to
 7 support an argument that Orient-Express should be
 8 accorded the same status as The Anita was in The
 9 Kleovoulos of Rhodes, we would submit it is utterly
 10 misguided.
 11 A number of reasons for that. Firstly,
 12 Orient-Express only dates back to 2010. Unsurprisingly
 13 perhaps, the courts haven't considered the point in the
 14 meantime. It's a first instance decision. Ms Mulcahy,
 15 later on when she comes to the law on causation, will
 16 tell you what happened in relation to the appeal, but
 17 there is the perhaps distinct possibility that insurers
 18 fought off the pursuit of an appeal because they wanted
 19 to bank the decision in order to deter future
 20 policyholders. And it has not met with any positive
 21 approval in textbooks from commentators; on the contrary
 22 it has at the very least been questioned.
 23 I don't want to go at this stage into the rights or
 24 wrongs of the questioning; this is purely as a question
 25 as to whether these policies should be construed against

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1 the background of settled law.
 2 If I could remind my Lords firstly of what we have
 3 said in our skeleton at 306, that is {1/1/120}. There
 4 we mention the criticism of it in Colinvaux and in
 5 Riley, or the doubt expressed about it. Then, perhaps
 6 unsurprisingly because I suspect it is the same author,
 7 Colinvaux and Merkin at {J/148.1/11} to page 12. Thank
 8 you.
 9 If we move on to 12, you will see he deals with
 10 Orient-Express, you can see it on the bottom left-hand
 11 corner. If I could just move on to page 12, please.
 12 You will see that at the foot of page 12 he said the
 13 reasoning -- at the end of this passage it says:
 14 "Indeed, the reasoning renders the primary cover
 15 under business interruption policies of little value
 16 where a catastrophic event has affected both the
 17 assured's premises and the surrounding district."
 18 Hardly a ringing endorsement.
 19 Finally, at {K/194/12}, just about legible, I think,
 20 there is the one reference to Orient-Express, that is
 21 the only reference in Professor Clarke's book to
 22 Orient-Express, it is in the footnote; and having set
 23 out the rule of proximate cause in the first sentence of
 24 25.3, in England the proximate cause is said to be the
 25 efficient or dominant cause, footnote 1 refers to

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

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

1 require the policyholder to prove the presence of the
 2 disease within a certain distance from the premises, for
 3 example 25 miles or 1 mile. The issue is how should the
 4 policyholder prove that, and the court ruled that there
 5 should be two issues determined at the trial: firstly,
 6 the types of evidence on which the policyholder should
 7 be entitled to rely; and secondly, assuming that it is
 8 the best evidence, would the evidence on which the FCA
 9 has relied prima facie be sufficient to discharge the
 10 burden of proof.
 11 I will deal with those issues in turn. But as
 12 a preliminary point, the defendants appear, particularly
 13 this is in the Ecclesiastical /Amlin skeleton, which is
 14 adopted by other defendants, that we are seeking to
 15 prove somehow that the Imperial Cambridge analysis is
 16 the best evidence available. That is not the case. We
 17 simply seek to show, in accordance with the court's
 18 ruling, that estimates such as the Imperial analysis or
 19 the Cambridge analysis are a type of evidence on which
 20 a policyholder should be entitled to rely; and, of
 21 course, assuming that that is the best evidence that is
 22 available, we then say that it is prima facie sufficient
 23 to discharge the burden of proof. But we don't seek to
 24 positively prove that it is a type of evidence which the
 25 court would be bound to accept at this stage, without

1 anything more.

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

4 MR EDELMAN: There are some limited issues, my Lord, and
5 I just wanted to go through what those issues are.

6 We have got the NHS death data, and that is the
7 first one.

8 The parties are agreed that the NHS data showing
9 people who tested positive and died is available. And
10 they agree, and this is in the agreed facts, that if
11 there is only one hospital in a particular trust and
12 that hospital is in the relevant policy area, then that
13 shows that there was the disease in the area. That is
14 paragraph 37A of Agreed Facts 3 and we don't need to
15 turn it up.

16 The defendants have admitted that certain uses of
17 that data is permissible.

18 QBE has admitted that form of evidence may be used;
19 that is their defence paragraph 35.2.

20 RSA, the defence of which other defendants have
21 adopted, has admitted that it may be used where the NHS
22 trust operated only one hospital in the relevant policy
23 area; that is their defence at 21(b). But what they say
24 is that there is this issue with the timing. They say
25 that you can't rely on it as showing the presence of

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1 COVID on a particular date. They argue that the data
2 only shows that at some point the patient tested
3 positive for COVID, died in hospital and, they say, that
4 person may have been in hospital for COVID, recovered
5 and then died of something else.

6 Well, we say firstly it is sufficient to show that
7 there was a case of COVID at some point in the recent
8 past, the limited timeframe in question being March, and
9 that would be sufficient for the policy triggers. But
10 secondly and in any event, I mean this really is
11 clutching at straws. Their premise is someone caught
12 COVID in March, within the same month recovered from it
13 in hospital and then died from something entirely
14 unconnected; and for that reason, they say that this
15 data is unreliable as to date.

16 Well, our submission --

17 LORD JUSTICE FLAUX: Isn't this one of the reasons why there
18 has been a query about the Public Health England death
19 data? Because they are based upon particular
20 assumptions as to people having tested positive at some
21 point in the past, and then, as it were -- I mean, I
22 follow your point that if somebody has caught it and
23 been very ill with it, you might say well it is unlikely
24 that they then go and die of something else, if they are
25 that ill. But I mean this is part of the general

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1 discussion, isn't it, about the reliability of the data?
2 Which really we can't trespass into, I don't think, not
3 on the evidence we've got at the moment anyway.

4 MR EDELMAN: My Lord, all I am saying is that the test data,
5 the evidence of deaths, in relation to someone who was
6 tested positive, in a hospital, on a given date, is
7 evidence that COVID was present in the relevant policy
8 area. We don't need to prove that the death was caused
9 by COVID. So that is not what we are proving. So
10 I take my Lord's point entirely.

11 LORD JUSTICE FLAUX: I follow the point that if you have got
12 evidence that somebody tested positive, then you have
13 the presence of the disease and it is neither here nor
14 there as to whether that particular person recovered or
15 not.

16 MR EDELMAN: Yes. Whether the hospital data is right in
17 ascribing COVID as a cause of death is not the point we
18 are getting at. We are just using the death data to
19 show that it was present on a date. And what they are
20 saying is: well, they may have died of something else.
21 Fine.

22 LORD JUSTICE FLAUX: So what, you say.

23 MR EDELMAN: So what? We can still use the death data,
24 which records that someone was positive for COVID, as
25 evidence that they had COVID.

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1 It may be that the defendants could say: well, this
2 person could have had COVID in some other relevant
3 policy area, travelled to the hospital, being ill with
4 something else, having recovered from COVID, and died.
5 If they are going to exclude the data for that rather
6 far-fetched case, we would say that is a situation where
7 the court ought to say, well, the policyholder can rely
8 on this death data, but of course it would always be
9 open to an insurer to disprove the validity of the data.
10 We are not asking for the court to say that this sort of
11 data is conclusive, but that this sort of data is the
12 type of data on which a policyholder should be entitled
13 to rely.

14 MR JUSTICE BUTCHER: If the question is: if this is the best
15 evidence, can a policyholder rely on it, that may in
16 a way answer itself, may it not?

17 MR EDELMAN: Exactly. I mean that is the second question,
18 my Lord.

19 The first point is: can we get through the hurdle of
20 showing that this is a type of evidence on which we are
21 entitled to rely? And we say, this death data, yes.

22 Then the next question is: if that is the best
23 evidence that is available, does the court say, "Well,
24 if that's the best you have got it's rubbish, it goes in
25 the bin" or does the court say, "If that were to be the

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

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

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1 other evidence. But it is this straggling issue that we
 2 now need to move on to, and it applies also where you
 3 have got, for example, a hospital trust with more than
 4 one hospital in an area, and you have got a record for
 5 the trust but that trust area extends beyond the
 6 relevant policy area.
 7 You then have cases, there are some cases with
 8 a 25 million radius, and if I can just -- you have
 9 probably seen it in our skeleton , but {1/1/77} and
 10 page 78. It is not coming up. That shows how large
 11 some of these 25-mile areas can be, and my Lords will
 12 have seen it in the skeleton argument.
 13 What we would submit is that what we can do is to
 14 apply to these cases a -- firstly , I will deal with the
 15 weekly cases; we can use that for a period of time,
 16 given the period of infection , so my Lords have in the
 17 agreed facts -- and I will give you the references again
 18 to speed things along, it is footnote 21 and 24 of
 19 Agreed Fact 3. An individual will be infectious for
 20 a period of time; that is seven to 12 days the
 21 infectious period is said to last for in moderate cases,
 22 up to two weeks on average in severe cases, so the
 23 average period of infection is about ten days.
 24 So we are entitled to rely on the data for a spread
 25 of period. The average period of infection is ten days,

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1 and so we say we should be able to rely on cumulative
 2 totals , and so the policyholder can rely on the window
 3 of cumulative cases leading up to the date of its claim.
 4 I think what the defendants are saying is you have
 5 to prove a case on a particular day. We say, well
 6 actually you can take these statistics , in particular ,
 7 for example, the weekly statistics , but all other
 8 reported cases, and they give you a picture for
 9 a period.
 10 As I said, you then get to the question of --
 11 LORD JUSTICE FLAUX: I am not sure I am following the point
 12 here. If you take, for example, a period beginning with
 13 Monday 16 March, if you have got ONS death data for the
 14 week ending Friday 13 March -- sorry, for that week,
 15 that week, in other words, the week ending 20 March, and
 16 the average infection period is ten days, then it is to
 17 be inferred , isn't it, that the people who died of COVID
 18 during that week were infected with it at the beginning
 19 of that week on 16 March?
 20 MR EDELMAN: Whether they died with it, they died having it.
 21 We don't need to worry about the cause of death. If
 22 they died having it they must have had it for at least
 23 a period of ten days.
 24 LORD JUSTICE FLAUX: A period of at least on average ten
 25 days.

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1 MR EDELMAN: Yes, and if they were severe enough to be in
 2 hospital they probably had it for at least two weeks.
 3 LORD JUSTICE FLAUX: For longer, yes.
 4 MR EDELMAN: So what we say is that you can spread the
 5 figures backwards from the date, and that includes the
 6 weekly totals, because the defendants make a point, they
 7 say that the weekly totals don't tell you what day the
 8 person was infected, and we say, well, you can spread
 9 that across the period.
 10 LORD JUSTICE FLAUX: Yes. Okay.
 11 MR EDELMAN: I think I may have jumped ahead. It may have
 12 been my fault. More haste less speed. I was trying to
 13 jump forward a bit and missed out that point. But that
 14 is an important point because they tried to tie us to
 15 the particular date of the data as opposed to spreading
 16 it backwards by reference to the period of infection.
 17 Now we come to averaging and whether averaging is
 18 a methodology that a policyholder should be entitled to
 19 use. That applies to ONS death data across a local
 20 authority area, which is larger than the relevant policy
 21 area; reported cases across a regional local authority
 22 area, again larger than a relevant policy area; and of
 23 course again reported cases uplifted by an undercounting
 24 ratio, which I will come to in a moment.
 25 The defendants have objected to even distribution

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1 and we recognise that and we have tried to accommodate
 2 that by accepting that the averaging should operate on
 3 the basis of population weighting.
 4 Now, if one takes for example -- if I can go now
 5 please to $\{1/1/81\}$ -- a picture of Cornwall. So that is
 6 a 25-mile radius from a central point in Cornwall.
 7 What one can do is identify the number of reported
 8 cases up to the date of the claim. But that will be,
 9 let's assume that is for Cornwall as a whole, because
 10 Cornwall is a relevant authority area. You can see then
 11 that the relevant policy area is smaller than the
 12 reporting area.
 13 You can then take the population of Cornwall, and
 14 the population within the relevant policy area, using
 15 publicly available data showing population by postcodes
 16 and combining the population of those postcodes, and
 17 then you can find the proportion of the population in
 18 Cornwall that is within the relevant policy area, and
 19 then average the number of reported cases. If there was
 20 only one reported case in all of Cornwall in a given
 21 period you might say well you can't prove it. But if
 22 you have 100 or a 1,000, that is likely to tell you on
 23 the balance of probabilities overwhelmingly on the
 24 balance of probabilities that there would have been at
 25 least one person and probably very many people in the

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1 relevant policy area with COVID.
 2 We say this is a type of methodology which
 3 a policyholder should be entitled to use.
 4 Once again, in every case it would be open to an
 5 insurer to say that for some reason this methodology is
 6 inappropriate: let's look at the numbers and they can
 7 all be accounted for by a care home which is outside of
 8 the relevant policy area, and that accounts for
 9 100 per cent, or such a high proportion of the cases,
 10 reported cases, that makes your analogy inaccurate.
 11 We are not asking you to determine that. All we are
 12 simply saying is that weighted averaging should be
 13 a type of methodology on which policyholders can rely.
 14 We say that is a methodology that can be used with
 15 all this data, wherever necessary, as a type of
 16 methodology. It is sufficiently sound to pass muster as
 17 a valid methodology. That doesn't mean that it is going
 18 to give the right answer in every case, but it is a type
 19 of evidence.
 20 Then the next issue is the undercounting ratio.
 21 Again is it appropriate for a policyholder to rely on
 22 the type of evidence that the Imperial and Cambridge
 23 analysis has produced as a type of evidence that would
 24 be an acceptable form of methodology.
 25 MR JUSTICE BUTCHER: Is that in dispute, Mr Edelman? As

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1 opposed to whether that study is right; whether that
 2 type of evidence is right, is that in dispute?
 3 MR EDELMAN: What the defendants say is, they say that in
 4 order to use this sort of methodology the policyholder
 5 has to positively prove that it is reliable. We say
 6 that is setting the bar far too high when one bears in
 7 mind that what we are dealing with here is what will be
 8 the unknowable. We will never know how many people
 9 actually had it. All we can do is to look to people
 10 like Imperial and Cambridge to come up with models to
 11 give us estimates. And they will never ever be more
 12 than that; they will be estimates.
 13 So what we say is it is sufficient if the report is
 14 relevant, in the sense that it is addressing the right
 15 issues at the right timeframe, and the defendants have
 16 come up with a report from May. We say that is the
 17 wrong timeframe. It has got to be a relevant report
 18 which is addressing the prevalence of COVID in the UK
 19 in March. And it has to be from a suitably qualified
 20 institution.
 21 That is the sort of evidence that a policyholder
 22 should be entitled to rely upon. Whether it is reliable
 23 evidence would then be tested in the case. But to
 24 require a policyholder to prove as a sort of threshold
 25 point that it is reliable is, we say, we submit, setting

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1 the standard too high.
 2 The type of evidence the court should set, all you
 3 should say at the moment is not to apply any qualitative
 4 standard to it other than it should be relevant and from
 5 a suitably qualified institution .
 6 So not a journalist making a back of the cigarette
 7 packet calculation , but from an institution that has
 8 recognised expertise and qualification in doing this
 9 sort of study.
 10 They are bound to differ , and to say that it must be
 11 reliable is to expect the impossible . They are bound to
 12 come up with different results . What the policyholders
 13 will be seeking to do in this case is not to provide an
 14 exact number, but to give , if it was proving it , to give
 15 the court a ballpark figure of what is meant by "much
 16 higher", which is what most of the defendants accept,
 17 that the number of cases was much higher than the number
 18 of reported cases.
 19 LORD JUSTICE FLAUX: Going back to your point about
 20 Cornwall, for example, I suppose if it were the case
 21 that it was only one reported case for the whole county
 22 on the relevant date, and if the undercounting evidence
 23 is that in fact that is an underestimate to the tune of
 24 a 1,000%, so there are in fact ten cases, then you say
 25 the policyholders should be entitled to rely upon that

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1 in principle at least , and it would always be open to
 2 the insurers to rely upon their own expert evidence to
 3 say, well, actually it has only been undercounted to the
 4 tune of 200%; there are only two cases; and they were
 5 both in a care home outside the policy area .
 6 MR EDELMAN: Exactly. They would then be able to do that
 7 for their evidence and say when you are multiplying up
 8 from that number you have got to then focus on where
 9 they were because it is more likely there would be
 10 a cluster around the reported case, for example.
 11 LORD JUSTICE FLAUX: Yes.
 12 MR EDELMAN: All on the individual facts; none of that
 13 closed off from insurers at all . We are just saying
 14 that there is a starting point . Let's say more
 15 realistically you had a more significant number in
 16 Cornwall, you uplift that by the undercounting factor
 17 according to a relevant and suitably qualified
 18 institution 's prediction , and then do the averaging
 19 process to see where that gets you.
 20 In the vast majority of cases it is going to get you
 21 to such a high number anyway that whether it is 1 in 100
 22 or 1 in 50 is not going to make any difference .
 23 LORD JUSTICE FLAUX: No.
 24 MR EDELMAN: That is why we submit that the court ought not
 25 to put up what the defendants want you to put up, some

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1 sort of qualitative burden, before this evidence passes
 2 muster.
 3 A claimant should not have to prove that some
 4 respected scientific institution has produced a reliable
 5 result . They can just produce the result and that
 6 should be of itself a type of evidence on which the
 7 parties can rely .
 8 MR JUSTICE BUTCHER: Mr Edelman, I am sorry, I am no doubt
 9 repeating myself. If there is an estimate by
 10 a reputable institution and then there is nothing said
 11 against that, then one might assume that that was likely
 12 to be concluded to be reliable . Whereas if there was
 13 something said to contradict it on reasonable grounds
 14 then one might say that it wasn't reliable .
 15 MR EDELMAN: Precisely, my Lord, and I don't disagree with
 16 that. But I think what we balk at is that the
 17 defendants appear to require the claimant not just to
 18 present the evidence and say, well, look there is
 19 nothing else that contradicts it; here are three
 20 studies, they are all in the same ballpark; they have
 21 got to prove reliability . You have actually got to call
 22 scientific evidence to justify the methodology used by
 23 the institution and have it subjected to being as it
 24 were tested, in inverted commas, by the defendants
 25 really as they have tried to do -- and I appreciate they

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1 have not been able to get their own expert evidence --
 2 but as they have tried to do in this litigation .
 3 So that's what we say about the exercise . Now
 4 I have not got much more to say but, my Lords, if you
 5 would allow me perhaps five minutes more I can finish ,
 6 but I am happy to do it at 2.00.
 7 LORD JUSTICE FLAUX: If you think you can finish this topic
 8 in five minutes let's go on and finish it .
 9 MR EDELMAN: Because the next stage is whether, if this is
 10 the best evidence that a claimant can provide, all the
 11 types of evidence that we have been discussing , if it
 12 was the best evidence that was available should it be
 13 sufficient to discharge the burden of proof, then in the
 14 Equitas and R&Q case methodology shift the burden,
 15 whether one describes that as the evidential burden or
 16 the legal burden is semantics, we all know what we mean,
 17 shift the burden on to the insurers to prove something
 18 to the contrary, show something to the contrary .
 19 Now, the difference we face in this situation from
 20 the Equitas case is that was a private dispute with
 21 a privately commissioned report, where obviously there
 22 may have been an issue as to reliability given it was
 23 commissioned by one of the parties ; but here we are
 24 dealing with either publicly available information or,
 25 having got through the qualifying hurdle of being

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1 a relevant and suitably qualified institution, an
2 independent analysis of the information. We submit if
3 that was the best that was available, that ought to be
4 treated by the court as sufficient evidence, recognising
5 that we are in the realms of something that will never
6 be known, and cannot ever be known.

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

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

23 MR JUSTICE BUTCHER: That almost boils down to saying: the
24 best evidence is the best evidence. I mean, you are not
25 asking us to say anything specific about this study,

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1 merely, as I understand it, you are saying that if this
2 is the best evidence then it should be sufficient.

3 MR EDELMAN: Yes. One could say, my Lord, that in some
4 situations, and this goes back to The Popi M, if that is
5 the best you have got, if that is the best evidence that
6 you have got available, it simply isn't enough.

7 MR JUSTICE BUTCHER: I understand.

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

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

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

25 LORD JUSTICE FLAUX: Yes, okay.

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1 MR EDELMAN: My Lord, those are the submissions I make on
2 this topic. Obviously we seek declarations about this,
3 but it may be that once the parties have got the court's
4 ruling it will be easier to get the text of the
5 declarations then, because then we can understand
6 precisely what it is that you have said.

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

9 MR EDELMAN: Yes, of course.

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

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

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

14 See you at 5 past 2.

15 (1.06 pm)

(The short adjournment)

16 (2.05 pm)

17 MR EDELMAN: My Lords, causation.

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

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1 because it is fundamental to what the court is being
2 asked to decide. It is not being asked to decide how
3 extra contractual rules of causation work in tort, or
4 for breach of contract; it's not being asked to
5 disapply, rule on or modify the rules of proximate or
6 "but for" causation as they apply to the law of
7 obligations. What it is being asked to do is rule on
8 their application within the confines of specific BI
9 insurance policies.

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

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

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1 resolve the questions that are before the court or limit
2 the role of construction in this case.

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

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

24 But there is a certain degree of common ground
25 between the parties, because the defendants impress on

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1 your Lordships that the principles of construction can
2 be derived from the intentions of the parties to the
3 contract, and they say that the commercial context is
4 the key determinant of the causation question. We don't
5 disagree. Common sense, which is often deployed in
6 relation to causation, only comes into play once you
7 have set the legal parameters for its operation by
8 reference to the contract.

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

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

25 I just want to deal for a moment with the concept of

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1 an insured peril and what that all involves.

2 Now, my Lords will be familiar, section 3 of the
3 Marine Insurance Act defines "maritime perils" as things
4 like perils of the sea, fire, war risks. These are the
5 perils that may cause loss of or damage to the vessel or
6 cargo.

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

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

15 This is what he said in the second column:

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

19 Then a few lines down he says:

20 "Expressions such as 'to ensure against' or 'save
21 harmless from loss' may be capable of misleading. It
22 seems to me that the best way to define an indemnity
23 insurance is that it is an agreement by the insurer to
24 confer on the insured a contractual right which
25 prima facie comes into existence immediately when loss

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1 is suffered by the happening of the event insured
2 against, to be put by the insurer into the same position
3 in which the insured would have been had the event not
4 occurred but in no better position."

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

14 You will see that it says:

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

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

22 Now, the defendants are very keen in their causation
23 case to say that what one takes out for the purposes of
24 the counterfactual is "the insured peril". Now, the
25 public authority denial of access type clauses -- and

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1 I hope my Lords' reading is sufficient for me to use
2 those shorthand references -- although they acknowledge
3 and aver that the loss or interruption or interference,
4 as the case may be, has to be caused by the combination
5 of matters identified in the clause, they then
6 cherry-pick the bit out of the clause that suits them to
7 cherry-pick as being the insured peril, and leave the
8 rest for the purposes of the counterfactual.

9 As I will demonstrate to you later on in my
10 submissions, they are not always consistent in what they
11 cherry-pick.

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

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1 As for the disease clauses, if this weren't
2 a virtual hearing you would probably be able to see or
3 hear those insurers with those clauses signifying their
4 vigorous agreement to what I just said, with Mr Kealey
5 perhaps grinning like a Cheshire cat, implying that of
6 course in their cases the insured peril is the disease
7 within the relevant policy area and therefore Mr Edelman
8 has just confirmed for us that the counterfactual is the
9 business not being in their area but being everywhere
10 else.

11 LORD JUSTICE FLAUX: He could turn on his camera and we
12 could see whether he is laughing like a Cheshire Cat
13 or not.

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

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

20 Firstly, if you are dealing with something occurring
21 not at the premises, but at some distance from the
22 premises, whether it is one mile or 25 miles, you are
23 necessarily not addressing something that would of
24 itself directly affect the business or its premises.

25 You are not talking about a contamination. Rather, you

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1 must necessarily be contemplating something else
2 happening, which does have an effect on the business,
3 most obviously the reaction of the authorities, but it
4 could of course also be the reaction of the public.

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

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

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

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

18 So that is the nature of the beast that these
19 clauses are contemplating.

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

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1 authorities to the epidemic is to be treated by this
2 counterfactual as if it was a reaction to the outbreak
3 everywhere other than the relevant policy area?

4 My Lord, I hope Mr Justice Butcher is all right.

5 I couldn't see him on the screen.

6 LORD JUSTICE FLAUX: He is just looking at something,

7 I think.

8 MR EDELMAN: I'm sorry.

9 So the question is: can that truly have been
10 intended to be the counterfactual, or is the purpose of
11 the relevant policy area merely to ensure that the
12 policy will only respond as long as the disease itself
13 was present in the relevant policy area, ie it doesn't
14 have to be exclusively, but as long as it is?

15 That then makes absolute commercial sense of the
16 choice that insurers have of the size of the relevant
17 policy area.

18 MR JUSTICE BUTCHER: Why would you want to say that,
19 Mr Edelman? If you are, as it were, covering something
20 which might be caused well outside that area, why would
21 you then want to say that there needs to be some
22 incidence within the area?

23 MR EDELMAN: This is exactly what I was going to say,
24 my Lord caught me in mid-sentence, because we are now
25 looking at a disease which has spread very quickly and

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1 very dramatically. That is on the spectrum of
2 possibilities.

3 But there is a whole range of lesser possibilities,
4 and the choice that insurers have as to their commercial
5 risk is to how serious an outbreak they are prepared to
6 cover. The more extensive the relevant policy area, the
7 less severe the outbreak would need to be for the policy
8 to be triggered.

9 LORD JUSTICE FLAUX: I don't see how that works in the
10 question that my Lord posed to you, because if the truth
11 was that this was intended to cover epidemics or
12 pandemics or whatever, then the loss which the insured
13 suffers is the same, irrespective of whether there is an
14 incidence within 1 mile, 25 miles or whatever. What the
15 insured would want to be protected against in that
16 example is the loss he is going to suffer as a result of
17 government action closing his premises because of an
18 epidemic disease in the country. So the 1 mile and the
19 25-mile limits don't seem to me at least to make any
20 sense at all, if this was epidemic cover.

21 MR EDELMAN: My Lord is misunderstanding my point and it may
22 be my fault.

23 LORD JUSTICE FLAUX: Quite possibly, Mr Edelman.

24 MR EDELMAN: It may be my fault for not presenting it
25 correctly.

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1 When you are giving this cover, you are covering
2 a range of possibilities, from minor local outbreaks of
3 something like measles all the way up to some new
4 unexpected disease, an epidemic. The fact that that is
5 within the ambit of the insurance doesn't mean that that
6 is, as it were, the vanilla risk that the insurance is
7 covering.

8 I think it may be still up on the screen, let's look
9 at the RSA policy. One of the perils is earthquake, the
10 first one. Yes, there are some very minor earthquakes
11 in the UK, often associated with mining activities, but
12 the UK is not known for being at risk of earthquakes.
13 But, of course, the insurers, by that language, do take
14 the risk of some cataclysmic event, unexpected, which
15 only with hindsight do the scientists realise will recur
16 everyone million years, and it is just bad luck. It is
17 like those who got caught out by the October 1987 and
18 the January 1997 storms, 300-year return dates. That is
19 within the scope of the risk, however unexpected it is.

20 Now, what my Lord was putting to me is this is
21 epidemic cover. It's not designed as with this
22 earthquake cover, it is not contemplating as the
23 ordinary risk, the cataclysmic earthquake, but it is
24 encompassing epidemics within its scope, and when you
25 look at the relevant policy area that makes sense for

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1 the nature of diseases that would occur, as in the
2 nature of the earthquakes that would occur.

3 And that means that if one has a one mile policy
4 there is less risk for the insurer of being impacted by
5 a disease which breaks out than if one has a 25-mile
6 limit. But if one has a 25-mile limit, one is already
7 contemplating that there could be something pretty
8 serious, because for something in Maidenhead to affect
9 a restaurant in Central London, which is the outer edge
10 of a 25-mile radius from Central London, it must be
11 something quite significant. It is not going to be an
12 outbreak of measles or mumps, not going to be
13 Legionnaires' disease, but of course having the one mile
14 limit means that even if the insurer was insuring in
15 Maidenhead, if there was an outbreak of Legionnaires'
16 disease there would be less chance of it affecting the
17 one mile radius than it would if he had 25 miles.

18 So it is a relevant restriction for the nature of
19 the risk, in that it does affect the extent of the risk
20 that insurers are taking. But, and this is the critical
21 point, it doesn't define it, because what they are
22 insuring is the nature of the disease and the reaction
23 to it. All they are doing is saying it must at least
24 impact in your area, the disease must impact in your
25 area for you to be covered.

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1 So if something happens in London and because
2 politicians are said to be London-centric, they shut
3 down the country when there is no incidence of the
4 disease in Manchester, you have no cover. But if, as in
5 this case, the disease is everywhere, it just so happens
6 because of the severity of the epidemic that the period,
7 that the distance requirement does not have the effect
8 of protecting insurers.

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

19 I emphasise again, it is within the ambit. I am not
20 saying this is there for epidemics, it is not there just
21 for epidemics, but it does encompass it.

22 What we would submit is to apply insurers'
23 counterfactual would defeat what was the apparent
24 commercial purpose of the clause, namely to protect the
25 insured against being caught up in the consequences of

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1 a wide area disease which manifested itself amongst many
2 locations, including the relevant policy area.

3 So what we really are faced with is insurers seeking
4 to insert into the insuring clause the word "only", only
5 within 1 mile, only within 25 miles, through the
6 counterfactual, which is not there, and doesn't make any
7 sense in the context of the nature of the risk.

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

18 Now I want to descend into a little bit more detail.
19 That was very much sort of overview stuff, and I want to
20 descend into a little more detail and start with some
21 illustrations and the public authority action clauses.
22 Let's have a look for that purpose, just for
23 illustrative purposes, at Hiscox's skeleton. It is
24 {I/13/111}. I seem to have the wrong page. Can I just
25 check? Sorry, page 47. Sorry. We want to see the

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1 clause first. It says:

2 "We will insure you against your financial losses
3 ..."

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

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

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

22 The interruption caused by inability due to
23 restrictions following vermin was for two weeks. The
24 losses from that interruption are recoverable, not
25 losses that do not result from that interruption,

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1 whether after or before. So we say -- and this is
2 insurers trying to paint our case differently from what
3 it is -- we are just focusing on that two weeks.

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

20 But any reasonable person would understand it to be
21 intended that for the purposes of assessing the losses
22 during the two weeks of the restriction, the vermin are
23 to be excised from the counterfactual, rather than
24 having to calculate the revenue that would have been
25 earned with vermin in the restaurant during the period

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1 of restriction , but without the authority restriction .
 2 That would render the cover entirely illusory .
 3 But that is what the defendants' case is . They say:
 4 you have been shut down due to vermin in your
 5 restaurant . The counterfactual is that you have still
 6 got vermin in your restaurant but you are not shut down.
 7 Now that is not -- and they say, well , Mr Edelman is
 8 treating vermin as the insured peril . It 's not about
 9 treating vermin as the insured peril . That is their
 10 point about: well , after the restriction , if you are
 11 right , that means that you still get losses because you
 12 are treating vermin as the insured peril . So after the
 13 restriction is lifted , you still get compensated.
 14 No, I am not saying that at all . It is about
 15 construing what the parties must have intended about the
 16 operation of causation where there is , as here, an
 17 underlying cause capable of having led to its own losses
 18 had the specific trigger not occurred, but where there
 19 is the combination of the underlying cause, the vermin,
 20 and the restriction .
 21 It is rather like , in a sense, the Stansbie case .
 22 In the abstract , the intervention of the burglar may be
 23 a dominant cause, but in the context of a duty that
 24 contemplates the possibility of burglars , where the duty
 25 is to protect against the burglars , the burglary is not

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

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

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

1 government action.
 2 Then they say, I think it is on the next page
 3 {1/12/64} -- can we move to the next page -- so they
 4 have mischaracterised and perhaps misunderstood our
 5 case, but the next page they say:
 6 "From Early March ... the local group starts to see
 7 a marked downturn in the number of elderly people
 8 attending its events -- not least after the first UK
 9 deaths from COVID-19 are reported. The organisers
 10 decide to suspend their meetings before the government
 11 regulation in late March.
 12 "The agreement between the local group and the
 13 church is informal and rent is paid week by week ... [As
 14 read] ... the local group leader on his daily walk ...
 15 shouts from a distance that he hopes they can start up
 16 again soon and the local group leader shouts back that
 17 even if the church was reopened he can see no hope of
 18 starting again in the foreseeable future, because
 19 several of the group have died and the others are
 20 shielding strictly."
 21 Now that poses a straight causal question. It is
 22 not a simple counterfactual question, it is simply
 23 a question of "but for" the interruption or
 24 interference, would the rent payments have been
 25 received? And it is going to be a question of fact

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1 where there is casual income like this, and the answer
 2 will depend on the facts. If the 16 March order to stay
 3 at home and minimise travel and shield amounts to
 4 qualifying interference or interruption or interference,
 5 and the cancellation was after 16 March, then the loss
 6 may result from the interruption or interference,
 7 depending on the reasons of the group for cancelling.
 8 If the 16 March order to stay at home and minimise
 9 travel was not interruption or interference, then the
 10 income stopped before any interruption or interference,
 11 it wasn't the result.
 12 But this is the important point: going back to the
 13 collections, our vanilla case, the loss of collections
 14 because people can't come to church because the church
 15 is closed, what is being said is: ah well, because of
 16 the emergency they wouldn't have come to church anyway.
 17 So the closure, the added ingredient of the closure,
 18 didn't cause you any loss, because of that
 19 counterfactual.
 20 That is where we part company from the defendants.
 21 That is where we say it is wrong in principle to start
 22 carving out an ingredient of the clause and using that
 23 as a counterfactual to reconstruct.
 24 That, in essence, where you have got these composite
 25 clauses, that in essence is what our case is. We are

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1 not trying to recover losses like the restaurant
 2 donation that you saw, that has nothing to do with the
 3 closure of the church. Other policyholders may want to
 4 argue that, the FCA is not. We are not precluding
 5 people from arguing it, but that is not the case that we
 6 are advancing.
 7 We are simply advancing the argument that if
 8 people -- if you lose collections because there is
 9 closure of the church due to an emergency, you don't
 10 take out the closure and imagine the emergency, just as
 11 you don't take out the local authority restriction and
 12 imagine the rats are still there, and you don't take out
 13 the police closure and imagine that the toxic lorry
 14 spill is still there. That would just undo the value of
 15 the insurance from anybody's perspective. It is not
 16 reasonable expectation. That is just commercial purpose
 17 inferred from the clause. You are working that out not
 18 by reference to authorities, you are just asking what is
 19 the purpose of this.
 20 MR JUSTICE BUTCHER: I understand, Mr Edelman, but I think
 21 one of the things which insurers say is in the sentence
 22 which you have just uttered, you assume that there has
 23 been a loss of the collections by reason of the church
 24 being closed as a result of advice or action. But
 25 I think one of the things which they say is because of

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1 the emergency, you didn't lose it because of that, the
 2 people wouldn't have been going anyway. In other words,
 3 you haven't got through the initial causative door.
 4 MR EDELMAN: But that is the same point, my Lord, as the
 5 lorry spill. Well, you say, the police closed off the
 6 area but that was 15 minutes after the lorry spill. You
 7 have got to prove what your loss would have been without
 8 the lorry spill. Because without the police cordon you
 9 would have still had the lorry spill. But of course the
 10 lorry spill is why you have got the cordon. That is the
 11 point I was making, that if you extract what they are
 12 saying is, well, you have got to take out the police
 13 cordon and then work out and prove that your loss or to
 14 what extent your loss is due to the added element of the
 15 police cordon, as opposed to the lorry spill which you
 16 have already got.
 17 My vermin case, you have got to prove what your loss
 18 is by virtue of the public authority restriction in
 19 circumstances where you have already got rats in your
 20 kitchen, but the policy is contemplating that there is
 21 a package of things, and it is simply a question of, you
 22 know, it is a question of judgment as to what the
 23 commercial purpose of this is, but do you unpack that
 24 package?
 25 What it is contemplating is that the church is only

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1 closed because there is an emergency. Do you assume: oh
2 well, we will take the emergency; or do you say: right
3 that is the package, and if you suffer a loss because an
4 emergency causes the church to be closed, you ask what
5 would the church's takings have been without that
6 package?

7 Just as you have the package of the vermin and the
8 local authority action, you take that package out. Now,
9 that doesn't mean that you take the vermin out for all
10 purposes. As soon as they cease to be a package, in
11 other words, as soon as the local authority restrictions
12 cease, then you only have the uninsured risk of the
13 vermin alone. But when they are in combination, you
14 don't dissect them for the purposes of a counterfactual.

15 I am sorry to use the word "dissect" in relation to
16 rats, but it is appropriate. That is what insurers are
17 doing, they are dissecting these clauses and taking what
18 is meant to be a package insurance, and dealing with it.

19 If one looks, sometimes the simpler cases are the
20 easiest. Police action due to a danger in the vicinity
21 and you get a lorry spill. Is it really intended that
22 you take-out the police action and leave the danger?

23 I am probably repeating myself, but if you start
24 looking at it that way, although we are looking at these
25 clauses in very unusual circumstances, it has huge

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1 ramifications for the commercial value of these policies
2 at all. If you are not going to cover the entire
3 combination, I'm not saying that you then, by covering
4 the combination you are covering each ingredient
5 separately as though when it exists on its own, but you
6 are covering the combination. If the insurers want to
7 say the insured peril is everything, well that is why
8 I went to the Marine Insurance Act, what is the insured
9 peril; it is the cause of the loss.

10 Here you have two combining causes. You have the
11 emergency causing the closure, the government action,
12 the closure of the church. Those are the two causes
13 which combine to create the loss.

14 MR JUSTICE BUTCHER: In your lorry spill case, and this is
15 what you need to help me on, all the loss may be caused
16 by the lorry spill, as it were, and the government
17 action doesn't actually change things at all really.

18 MR EDELMAN: Well it does, in my submission, because what
19 you then have got, if the church is closed, it is
20 inaccessible. That is, you know, you can't say that,
21 well, you could have had collections without the
22 emergency. If you look at the two counterfactuals, the
23 church is closed, that prevents the church collecting
24 any money in the usual way at services. There are no
25 services; it cannot collect.

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1 What you are then saying is: why is the church in
2 that situation? It is in that situation because it has
3 been closed because there has been an emergency. That
4 is what the policy is compensating you for. The simple
5 question is: is the purpose of that cover or any cover
6 to say, well, what would the position have been if you
7 take out the closure? And in our submission it really
8 does drive a coach and horses through the cover. In my
9 restaurant example, the man does what he should do, he
10 phones the local authority straightaway, and the
11 insurers say: well, you had rats anyway. So although
12 I know we say we will indemnify you if you are shut down
13 because of rats, you would have had rats anyway. And
14 the man would look at the policy and say: but your
15 policy contemplates that I would have had rats anyway.
16 They are not going to be instantaneous. The entire
17 pre-supposition of the clause is that there are rats on
18 my premises, and you promised me that if I am shut down
19 because of the rats you will compensate me.

20 LORD JUSTICE FLAUX: Will compensate you for the loss you
21 have suffered as a result of the premises being shut
22 down because of the rats.

23 MR EDELMAN: Yes.

24 LORD JUSTICE FLAUX: But if there are just rats and word got
25 around the town that there are rats running all round

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1 the street of that restaurant, he wouldn't have any
2 cover, would he?

3 MR EDELMAN: That would come in because the turnover would
4 have been --

5 LORD JUSTICE FLAUX: No, in my example he wouldn't have any
6 cover because it wasn't a closure, not because it is
7 closed but because word gets around the town, "Don't
8 bother going to Snooks Restaurant because he has rats
9 running around the place".

10 MR EDELMAN: Yes.

11 LORD JUSTICE FLAUX: So it is the closure which is the
12 trigger.

13 MR EDELMAN: The closure is one of the two required
14 ingredients.

15 LORD JUSTICE FLAUX: Yes, okay.

16 MR EDELMAN: But the example I gave was a situation where
17 the rats have entered the premises and, you know, within
18 an hour or two the phonecall has been made. As soon as
19 it is discovered the phonecall is made. And yet the
20 insurer is supposed to be able to say: oh, we
21 contemplated you having rats in your premises and being
22 closed down because of it, we are going to subtract from
23 the counterfactual the fact that you have got rats in
24 your premises, even though the insured combination has
25 occurred.

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1 That may be the answer that my Lords come to, but it
 2 doesn't strike one as being the sort of result that one
 3 would expect when looking at this sort of policy. Of
 4 course, you know, if the restaurant had a reputation for
 5 having rats in it, it may be that its turnover in the
 6 historical past would have been affected by its
 7 reputation for having rats and it will lose its
 8 indemnity that way or have a reduced indemnity that way
 9 because of its prior turnover.

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

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

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

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1 probably have closed it anyway. But that is not being
 2 forced to close down.

3 I have taken that aspect as far as I can. Unless
 4 you have any more questions on that topic, I was going
 5 move on to the disease clauses.

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

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

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

20 But the fact is they say that the worse the disease,
 21 the less your indemnity. What they go on to say is that
 22 is precisely what the relevant policy area part of the
 23 disease clause is sold to protect against: the damage
 24 caused by local occurrence of the disease, if it is so
 25 caused. It doesn't matter that the disease is also

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1 present elsewhere. But it does matter if it is the fact
 2 that the disease being elsewhere rather than in the
 3 relevant policy area, that is the cause of the BI loss.

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

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

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

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

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1 taken.

2 So Shop A. So we have got "not within 1 mile of any
 3 outbreak". Interesting that QBE refers to an "outbreak"
 4 rather than a single case. Quite right. But of course
 5 the cover is not triggered. That is the commercial
 6 advantage of having a policy with only a 1-mile radius.
 7 You have got more chance of any disease, whatever it is
 8 along the spectrum, not being in your relevant policy
 9 area.

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

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

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

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1 Once it becomes notifiable it falls within the
 2 clause but when it is not notifiable it doesn't.
 3 When it is not notifiable the disease is not
 4 covered. When it is notifiable the disease is covered.
 5 Similarly, and Ms Mulcahy will deal with the law, in
 6 The Silver Cloud the business would have suffered a loss
 7 as a result of terrorist attacks, but the relevant
 8 section of the cover responded where there had been
 9 a State warning. If there was a warning applicable to
 10 the business it was covered; if it wasn't it wasn't
 11 covered. It was simply reflecting the terms of cover.
 12 I think we have moved on. I think I wanted to be on
 13 page 21 {1/17/21}. I am sorry I am on the wrong page at
 14 the moment. It is 27, sorry. I am all over the place
 15 now. Can my Lords give me a moment?
 16 LORD JUSTICE FLAUX: We started off on page 28. You showed
 17 us paragraph 62 on page 28.
 18 MR EDELMAN: Yes, I am sorry, my Lord, yes.
 19 LORD JUSTICE FLAUX: Then you showed us something on page 5.
 20 MR EDELMAN: I think we were going back to page 25. Let's
 21 go back to page 5, the examples. Yes, {1/17/5}.
 22 If we can then move forward to -- my Lords have seen
 23 the other examples. There is Shop B, 100 yards away
 24 from Shop A, just under one mile from a care home; Shop
 25 C 100 yards away from Shop B, just under a mile from the

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1 hospital, and Shops A and B just over a mile away from
 2 the hospital, and there is a patient admitted and Shop D
 3 visited by a Spanish national. Those were the facts.
 4 We go to the next page. {1/17/6}. We then go to
 5 5.3. That is the period prior to 5 March. Not
 6 a notifiable disease. Therefore no cover. Correct.
 7 Then they say whilst it was causing interruption, if
 8 it was causing interruption, not capable of being an
 9 insured peril. That is absolutely right. It then
 10 becomes notifiable and it qualifies under the policy.
 11 It doesn't create an insured peril, it just becomes
 12 a qualifying disease for the purposes of the insured
 13 peril.
 14 Now the next page, please. {1/17/7}. Then we have
 15 four propositions. The first is the extensions don't
 16 provide insurance against loss caused by a pandemic or
 17 a national/international government response or public
 18 feared pandemic. We submit why not. The clause is
 19 triggered. The cover responds. It is triggered by the
 20 disease acquiring the status of being a notifiable
 21 disease. It is present within 1 mile of the premises.
 22 And through the impact on the government action it has
 23 caused the interruption.
 24 What they are getting at is that they say we are
 25 only insuring diseases within the 1 mile area. But

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1 that, again we come back to the question of
 2 construction, presupposes what this policy is
 3 contemplating. If it is contemplating a disease which
 4 would include within its ambit a new pandemic then why
 5 shouldn't it be treated as providing insurance on that
 6 basis.
 7 The second point, they do provide insurance against
 8 the occurrence of a notifiable disease. They have
 9 rephrased the wording but otherwise, yes.
 10 The occurrence, which is required to be the cause of
 11 the BI, is the interruption that is the cause of the
 12 loss, and it is the interruption following the disease.
 13 Let's move on to Shop B. We have got here the
 14 example of 23 March. If we go perhaps to the next page
 15 {1/17/8}, that example is based on 23 March. There were
 16 11,000 confirmed cases. Care home, a case in a care
 17 home not diagnosed, someone dies, but what they overlook
 18 is that someone must have brought the virus into the
 19 care home. This is the Shop B example.
 20 If you wanted to see that, that was back on page 5,
 21 to refresh your memory. If we go back to page {1/17/5},
 22 Shop B is just over 1 mile from a care home.
 23 Subsequently a resident died. They don't actually look
 24 at the reality of how the person in the care home
 25 actually got the disease. It could have been

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1 a relative, a care worker going in, but anyway they
 2 agree it is within the one mile. But they want to
 3 support an argument that because this person's case
 4 wasn't known about until after 23 March this is somehow
 5 relevant to the answer.
 6 But that is not a solution to their problem, because
 7 it is common ground between the parties that the
 8 Government did not know about all the COVID-19 cases
 9 that existed perhaps especially in care homes.
 10 The Government action which caused the interruption
 11 was a reaction to cases both known and inferred,
 12 anticipated and feared; what I would call the known
 13 unknown. You know there is a lot more out there, you
 14 just don't know precisely where and how much, but you
 15 know there is a lot of it out there. It was a reaction
 16 to the known and the known unknown.
 17 So the fact that someone did have it in a care home
 18 on 23 March, and inferentially must have got it from
 19 somebody on 23 March, is sufficient. It was part of the
 20 picture that caused the Government action, because of
 21 course you can subtract all of these cases, and this is
 22 the approach by the insurers. You subtract all of the
 23 cases and you end up with nothing. You end up with no
 24 COVID in the country at all, because every insurer has
 25 subtracted it on the counterfactual.

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

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

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1 well, subtract my area and you have still got all the
 2 rest. And they can have policyholders in two areas, and
 3 they can say to the one policyholder, "Well, but for the
 4 policyholder in the other area, but for the disease in
 5 your area you would still have had the restrictions
 6 because of the outbreak in the other area", and the
 7 policyholder in the other area, they can say the same.
 8 So nobody pays anything at all.
 9 The way one can look at it, there's two ways: one
 10 can say this all represents just one indivisible
 11 outbreak of a disease, and every known and unknown
 12 case -- when I say "unknown", I meant it is the known
 13 unknown; you know it is out there but you just don't
 14 know where it is precisely when you are the government,
 15 you just know it is everywhere, and you are looking at
 16 a tip of the iceberg -- that is all contributing to
 17 a picture we have, hence we used the jigsaw example, you
 18 put all the pieces in the jigsaw together and you have
 19 got the picture. And the picture is of one indivisible
 20 epidemic. An alternative way of looking at it is you
 21 can say each relevant policy area is a concurrent cause;
 22 it's making its own contribution to the national
 23 picture.
 24 Now, the critical question is: when you are applying
 25 these policies, do you go round the country and for

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1 every relevant policy area you take out that jigsaw
 2 piece and say, "I can just about still see the picture
 3 without that jigsaw piece, so you lose"? So nobody
 4 wins, nobody gets paid out for the worst example of
 5 a notifiable disease.
 6 So in other words, what these policies are insuring,
 7 according to the insurers, is a notifiable disease as
 8 long as it's not too bad a notifiable disease. If it is
 9 a really bad notifiable disease, which really impacts on
 10 your business, then we won't insure you. Because if it
 11 is a really, really bad disease, we have always got the
 12 "but for" causation test to fall back on.
 13 They try to legitimise that on the basis, well, we
 14 are only providing for local outbreaks, providing
 15 insurance for local outbreaks. If that is what they
 16 wanted to restrict it to, then why not restrict it to
 17 diseases for which there are known vaccines or known
 18 treatments? We had a little debate about that at the
 19 second CMC, I know, my Lords. But they haven't. It
 20 covers notifiable diseases, including anything which
 21 becomes a notifiable disease because it emerges unknown,
 22 untreatable, no vaccine.
 23 Their policies, they say, only are triggered when
 24 you can prove that a local case actually caused, itself,
 25 or a local combination of cases in your area actually

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

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1 first .
 2 LORD JUSTICE FLAUX: The whole LMX spirals, on one view at
 3 least was triggered by a whole series of natural
 4 disasters of one kind or another, all of which were said
 5 to be once in 100 years.
 6 MR EDELMAN: Yes, and it revealed to the insurance industry
 7 the mistake they had made with the spiral market.
 8 LORD JUSTICE FLAUX: Yes.
 9 MR EDELMAN: And maybe, in retrospect, the insurers now
 10 realise or believe they have made a mistake with these
 11 policies. But they are not to be protected from the
 12 fact that a cataclysmic event has happened. That is
 13 just, you know, bad luck being an insurer.
 14 Shop B is a line in the spreadsheet. The disease,
 15 the disease for shop B, that person in the care home is
 16 a line in the spreadsheet. And of course, you know, the
 17 care home, as I have said, the person in the care home
 18 must have got it from somebody, if they are bed-bound in
 19 a care home or confined to barracks in a care home,
 20 somebody has got to have communicated it to the person
 21 in the care home. So it is a pretty good bet that that
 22 was either a relative or someone working in the care
 23 home. Someone brought it in. So one has to be
 24 realistic about this as well.
 25 Would anyone looking at these clauses really think

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

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

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1 So if there is precautionary action taken, let's say
 2 you have got a 1 mile clause and, you know, you are in
 3 the City, and something happens in Piccadilly which
 4 causes restrictions in all of Central London, then there
 5 is no cover if the outbreak, whatever it is, that
 6 occurred in Central London was more than a mile away
 7 from your premises. It may be affecting you, but your
 8 business interruption cover doesn't cover it, because
 9 the outbreak of the disease was more than a mile away.
 10 It is a way of controlling the risk.
 11 LORD JUSTICE FLAUX: Not on your case, no.
 12 MR EDELMAN: My Lord, it is.
 13 LORD JUSTICE FLAUX: If it is a sufficiently serious
 14 outbreak, then it is going to impact everywhere.
 15 MR EDELMAN: My Lord, no. It depends what disease you are
 16 talking about.
 17 LORD JUSTICE FLAUX: I understand that point, Mr Edelman.
 18 MR EDELMAN: Let's talk about an emergency. Let's take
 19 disease out of the equation for the moment and talk
 20 about something like what happened in Salisbury. You
 21 might have a clause which talks about local authority or
 22 government action following an emergency within 1 mile
 23 of your premises. Now, if you are in the middle of
 24 Salisbury when the Novichok was discovered, I mean the
 25 danger of that is they didn't know where it was, and

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1 that was an emergency. If you are in the centre of
 2 Salisbury you are covered. If you are on the outskirts
 3 of Salisbury, I don't know how big Salisbury is, but on
 4 the outskirts, more than a mile away from the centre --
 5 LORD JUSTICE FLAUX: Far enough to be more than a mile away
 6 from the centre, sure.
 7 MR EDELMAN: -- then you don't have cover, even though the
 8 whole area of Salisbury is closed down, if the clause is
 9 an emergency within 1 mile.
 10 One has to remember also there are sub-limits to
 11 many of these clauses. So one can see this as a way of
 12 insurers controlling their risk with 1 mile, but with
 13 25 miles -- my Lord says: what is the purpose of that?
 14 In a sense, with 25 miles you are already covering
 15 a regional risk. 25-mile radius is about 4% of England.
 16 LORD JUSTICE FLAUX: It depends on where you are. Going
 17 back to your example of Cornwall, and also I think one
 18 of the insurers says with some force that quite a lot of
 19 the 25-mile radius, for example down pretty well the
 20 whole of the south coast, will actually be in the middle
 21 of the English Channel.
 22 MR EDELMAN: Yes, absolutely.
 23 LORD JUSTICE FLAUX: So it does depend on where you are.
 24 But I have got your submission, I think we have got your
 25 submission, it is a way of insurers controlling their

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1 risk.
 2 MR EDELMAN: It is, and they can choose 1 mile vicinity,
 3 25 miles, that is the way that they protect themselves
 4 against local outbreaks, because they protect themselves
 5 against local outbreaks with the 1 mile. 25 miles can
 6 be seen to be very generous. I quite accept that when
 7 it comes to a -- it is not once in a lifetime perhaps,
 8 because it is probably more than once in a lifetime, but
 9 it may be. The last epidemic, really, really bad one,
 10 was perhaps Spanish flu.
 11 LORD JUSTICE FLAUX: I think certainly in your lifetime and
 12 my lifetime, but possibly not some of the other people
 13 representing various parties, the 1957/58 Hong Kong --
 14 I think was it the Hong Kong flu, one of them, that was
 15 actually very bad.
 16 MR EDELMAN: Yes, my Lord.
 17 LORD JUSTICE FLAUX: I forget how many people. And the one
 18 in the late 1960s, something like 90,000 people are
 19 thought to have died in this country.
 20 MR EDELMAN: Yes, and there was, of course, also a polio
 21 outbreak, I think.
 22 LORD JUSTICE FLAUX: That was also very bad.
 23 MR EDELMAN: Certainly one which has had as dramatic an
 24 effect as this has, it is unprecedented, of course, but
 25 that doesn't mean that it is not within the insurance

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1 risk. And the fact that it is so serious and has
 2 provoked such serious consequences that in fact
 3 protections that insurers built into their policies
 4 don't work to make any difference, is just a product of
 5 the risk that the disease that has eventuated.
 6 It is really a question, it is almost, you know,
 7 sitting back and thinking about the purpose of this: are
 8 these restrictions really intended to eliminate coverage
 9 for the most serious type of notifiable disease, in
 10 circumstances where the clause is contemplating such
 11 a disease? It is in the definition of "Notifiable".
 12 One of the possible ingredients of what makes
 13 a notifiable disease notifiable is that it has the
 14 capacity for epidemic. That is not an exclusive one, it
 15 doesn't have to have an epidemic capacity, but it is one
 16 of the factors taken into account: is it an epidemic
 17 disease, contagious, infectious? So they are
 18 contemplating a new epidemic disease.
 19 The question is: is this a way of excluding
 20 liability for the worst sort of disease or is it just
 21 actually a control mechanism for the day in and day out
 22 outbreaks, with the 25-milers actually offering generous
 23 cover for that?
 24 I am reminded that if you want statistics on prior
 25 deaths, they are in {C/12/2}. It is 33,000 deaths in

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1 1957/58 and 80,000 in 2968/69. It is just up on the
 2 screen there, "Excess mortality".
 3 But of course the predictions, whether they were
 4 right or not, the predictions were that those figures
 5 would have been dwarfed had the government not taken the
 6 action it did.
 7 My Lord has gone on mute, I think.
 8 LORD JUSTICE FLAUX: That is a different issue, which
 9 mercifully we are not concerned with.
 10 MR EDELMAN: No, no, but I think one can't compare the
 11 mortalities --
 12 LORD JUSTICE FLAUX: Absolutely not. But one was just
 13 looking to see the scope of previous outbreaks. You are
 14 absolutely right, the worst -- the Spanish flu was worse
 15 than anything else.
 16 MR EDELMAN: Yes. The only reason I mention that is because
 17 it is said, or one of the arguments for the lockdown
 18 across all of Europe, except of course insurers'
 19 favourite place, which is Sweden, which may have been
 20 due to local constitutional reasons but we won't go into
 21 that, was because the fear that if we didn't have
 22 lockdown the volume of cases would be so great that
 23 hospitals wouldn't be able to treat people with it, and
 24 the mortality rate would be far higher than -- firstly
 25 the contagion rate would be far higher, and also the

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1 mortality percentage would be higher because there would
 2 be inadequate hospital beds to help people through if
 3 they were severely affected. So it was the double blow
 4 of that, both much higher infection and much higher
 5 mortality.
 6 So, yes of course we are looking at a very
 7 exceptional situation, but the question is: does the
 8 insurance apply to it?
 9 LORD JUSTICE FLAUX: Yes.
 10 MR EDELMAN: If it does, if it is, if one looks at it and
 11 says, well, it can't be excluding that prospect; and if
 12 it is not excluding it, then does causation come to the
 13 rescue? Because that is actually what these insurers
 14 are saying. They are saying: well, we could have said
 15 "only" but we didn't. But we will try and -- I think
 16 one argument was "within" means "only", which it
 17 doesn't. But causation, like the white knight on
 18 a horse comes charging to the rescue to deliver insurers
 19 from the absence of any restriction in their policies.
 20 This is not talking about -- I am not talking about
 21 a pandemic exclusion; I am talking about insuring risks
 22 of notifiable diseases.
 23 My Lords, I should, after some digression, return to
 24 Mr Howard's wonderful shops.
 25 LORD JUSTICE FLAUX: We diverted you somewhat, Mr Edelman.

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1 MR EDELMAN: No, no, I took you off because shop B led me on
 2 to a major topic. So it was self-made digression.
 3 We are on to shop C now, which is {1/17/8}. We have
 4 got this shop being a mile away from shop A. Remember,
 5 shop A had nobody within a mile. Shop C does have
 6 somebody within a mile. What he says in 7.2 is he says:
 7 "The critical ..."
 8 I see what the difference is now. I was working on
 9 a version before references were added, and I worked on
 10 those skeletons when they came, and the adding of
 11 references has changed the formatting. So I apologise,
 12 I tried to work out page numbers, but I will try and
 13 work through it.
 14 Does it make any difference that shop C was within a
 15 mile of a person who was diagnosed?
 16 "The critical difficulty for the insured would be to
 17 establish that the occurrence had any causative effect
 18 on the business.
 19 "Any downturn due to general concern about the risk
 20 of contracting ... government's advice, all of that
 21 happened whether or not there was a diagnosed case in
 22 the hospital. Put simply, whilst the insured peril had
 23 occurred (disease) within the 1 mile, it had not caused
 24 BI loss."
 25 To which the answer is the same as for shop B. Of

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

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1 relevant policy area, the policy ceases to apply,
 2 because you then cease to be able to prove that but for
 3 the outbreak in your area you wouldn't have suffered
 4 the loss.
 5 Now, that may be the result my Lords say follows
 6 from the proper laws of causation, but before you get to
 7 that you would be asking yourself what the commercial
 8 purpose and intention of these covers actually was, and
 9 was it intended to operate that way. That drives the
 10 causation question.
 11 All of us will spend many hours arguing it, but it
 12 really does boil down to that very simple question.
 13 What was the commercial purpose of this? What risk was
 14 it actually insuring? Because the causation rule can't
 15 be employed to undermine the risk that was being
 16 insured.
 17 I can give other examples, but take Wales. Let's
 18 say, you know, it is only 170 miles long; I know it is
 19 quite an irregular shape, so there might be quite a few
 20 25 miles, but cases in Cardiff but a number of cases in
 21 Swansea, 50 miles away, further afield in Pembrokeshire
 22 and the north, nobody gets paid out. Even with
 23 a 25-mile radius policy nobody gets paid out, because
 24 the insurers can always say -- let's say there are four
 25 25-mile radius areas for the sake of argument, that is

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1 about the size of Wales but I know it's irregular, and
 2 some would be out to sea, so I take that into account,
 3 it is just hypothetical, but you can say, well, each
 4 area, but for your area there would still have been the
 5 three others, and they still would have locked down
 6 Wales, so no payment.
 7 Of course there are, as I have already indicated,
 8 policies which have triggers which are triggered by an
 9 emergency likely to endanger life.
 10 One sees that in Arch, Ecclesiastical, RSA2. Danger
 11 in Amlin and Zurich; threat or risk of damage or injury
 12 in Amlin 3; health reasons or concerns, RSA4; incident
 13 in some of the Hiscox policies and Amlin2.
 14 For those QBE's examples are good examples of why
 15 there is cover: the national public authority responding
 16 to the spread of disease.
 17 Perhaps before I leave the example we should perhaps
 18 go on to Shop D which is page 9 of I/17. {I/17/9}
 19 COVID is brought into the shop three times by
 20 a Spanish visitor. What they say is the visit was
 21 unknown, didn't amount to an occurrence of a notifiable
 22 disease.
 23 We say, yes it did, the man was actually in the shop
 24 and he had the disease. It was unknown. Yes, but that
 25 is what the government was reacting to. There is

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1 theoretically more --
 2 LORD JUSTICE FLAUX: I think his point is that it was before
 3 it became a notifiable disease in England. So it was on
 4 5 March, wasn't it? So the visit on --
 5 MR EDELMAN: It was the day after, my Lord, 6 March.
 6 Notifiable on the 5th.
 7 LORD JUSTICE FLAUX: But 6 March. I was looking at the
 8 first one.
 9 MR EDELMAN: Yes, notifiable, yes.
 10 LORD JUSTICE FLAUX: Yes.
 11 MR EDELMAN: I think in his example he says "... visited on
 12 the 1st, the 6th and the 10th". I agree on the 1st it
 13 wasn't notifiable.
 14 LORD JUSTICE FLAUX: No.
 15 MR EDELMAN: But he had it. He was still in the area
 16 because he visited the shop on the 6th and the 10th. So
 17 there was an occurrence of the disease within the area,
 18 and it is just part of the tableau that was presenting
 19 itself country-wide.
 20 I am trying to see if I can shoot forward. But if
 21 one looks at the 25-mile clauses and the spreadsheet
 22 example, one has got even fewer lines on the spreadsheet
 23 for 25 miles. I will not give a number because of
 24 course the coast is very irregular. But that
 25 demonstrates that even more clearly, because it can't

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1 have been intended only for purely local outbreaks, not
 2 in the locality. That is, as I said, Central London and
 3 Maidenhead.
 4 So that is necessarily contemplating something much
 5 broader. And then to expect that clause not to cover,
 6 spill over into other areas, for cover to go when you
 7 are already contemplating 2,000 square miles is we say
 8 wholly unrealistic.
 9 So we say the answer to this case is to be found in
 10 the way in which one approaches causation. For
 11 a composite clause one excludes from the counterfactual
 12 the contemplated elements. For a disease clause you
 13 proceed on the premise that the parties contemplated
 14 a disease outbreak which might be part of a larger
 15 outbreak, hence the fact that it was related to
 16 notifiable diseases, but it was not the intention of the
 17 parties for causation to operate by treating the
 18 outbreak as a whole as part of a counterfactual. And
 19 the rationalisation in causation terms is that the
 20 outbreak would be a single indivisible cause or
 21 a current interdependent series of causes, all
 22 contributing to the same picture.
 23 My Lords, can I just say a few words about the word
 24 "following", because that is one of the causal
 25 connectors. It is a different topic. QBE and others

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

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

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

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1 If we go back to the previous page {B/17/34}, you
 2 will see there is an adjustment:
 3 "... if the damage had not occurred."
 4 The question that I want to pose -- and it is one
 5 that I am happy to be able to send my Lords away to
 6 ponder over overnight -- is you have here a policy with
 7 a contemplated peril, the insured peril which insurers
 8 are so keen to have, to identify and say, well, that is
 9 what you take out of the counterfactual. What do you do
 10 here.
 11 Let me take some examples which we will all know
 12 about. Buncefield, the explosion, covered by this
 13 policy. Let's imagine, because in fact I think this is
 14 true, it caused damage to property including a warehouse
 15 800 metres away. What is the counterfactual for the
 16 purposes of the business interruption claim. Do you
 17 remove the damage to property, but leave the explosion
 18 and its effects everywhere as part of your
 19 counterfactual even though explosion is an express and
 20 contemplated insured peril. So the more devastating the
 21 explosion the less the business interruption cover, even
 22 though explosion is identified as an insured peril for
 23 the purposes of the property damage cover. We would say
 24 not. We would say that where the policy contemplates
 25 perils, which can comprise wide area events, then

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1 obviously when you are forming your counterfactual you
2 must take into account the insured peril that the policy
3 contemplates.

4 But then that leads you to the question with
5 Orient-Express. Does that mean, if that is right -- and
6 you may say I am wrong, it would be a curious result --
7 but if that is right it would mean that an insured was
8 worse off with an all risks policy than he is with one
9 like RSA2 confined to identified insured perils.

10 MR JUSTICE BUTCHER: Just explain that for me, Mr Edelman.

11 MR EDELMAN: Because what Mr Justice Hamblen was saying in
12 Orient-Express is the hurricane is not an insured peril.
13 He had an all risks policy. It is only the damage which
14 is an insured peril. Where do I see in the policy that
15 it says hurricane is an insured peril.

16 So here we have got explosion is an insured peril;
17 it has caused the damage.

18 Now on a very strict black letter interpretation of
19 the policy, the business interruption cover says: "In
20 the event of damage we will pay you your business
21 interruption as a result of damage", and the adjustment
22 clause, results which would have been expected if the
23 damage had not occurred.

24 But we do now have, you know, contrary to
25 Orient-Express, a contemplated peril. We have the

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1 explosion in the property damage insuring clause. It is
2 why you are in the business interruption policy in the
3 first place, because you have got damage caused by
4 a qualifying peril.

5 If I am right, and the natural conclusion, the
6 natural construction of this is you don't leave the
7 explosion in for the counterfactual -- of course, you
8 know, if after the building has been repaired there is
9 then continuing loss that is when it is no longer
10 related to the damage to the building. I am talking
11 about while the building is in pieces on the floor. Do
12 you say, "Well, terribly sorry your building was
13 destroyed by an explosion. I know we agreed to insure
14 it and the business interruption resulting from the
15 destruction of it by an explosion specifically as an
16 insured peril ..."

17 LORD JUSTICE FLAUX: That argument can't be right, in the
18 example, because the property damage is caused by an
19 insured peril, namely the explosion, you don't extract
20 the explosion from your counterfactual analysis.

21 MR EDELMAN: That is right. I agree.

22 LORD JUSTICE FLAUX: But what you are trying to do is to
23 say, "Aha, in that case Orient-Express can't be right
24 because it is an all risks policy." But it is an all
25 risks policy that didn't cover against hurricanes.

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1 MR EDELMAN: It did. You have bought a better policy than
2 RSA2, because instead of being confined to specified
3 perils you had an all risks policy and hurricanes were
4 not excluded. But because you bought an all risks
5 policy without, you know -- my Buncefield example, if
6 this had been an all risks policy and there is no
7 exclusion for explosion, you put the explosion in the
8 counterfactual, because it is not an insured peril.

9 But if there is an insured peril, you have got a
10 narrower policy, it only covers you for insured perils
11 A, B and C, and one of those insured perils occurs, you
12 do get cover because it is an insured peril.

13 It is utter nonsense. It is completely the wrong
14 way round. You may say the answer is that you have got
15 to put the explosion in the counterfactual even when
16 it is an insured peril. But that is a coach and horses
17 through the policy.

18 It doesn't seem to have been -- I don't know whether
19 it was argued, but whether it was or wasn't doesn't
20 really matter. This is just practical insurance. It is
21 not law. It is just practicalities. Are you really
22 worse off with an all risks policy. It is not what
23 insurers sell all risk policies to be narrower than
24 a specified peril, or to provide narrower cover than
25 a specified peril, if a non-excluded insured peril

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1 occurs.

2 Now that gives you the clue as to what both the
3 counterfactual for -- firstly it gives you the clue as
4 to the counterfactual for business interruption losses
5 anyway, because you will see this clause, we are looking
6 at it, let's go back to page 35 {B/17/35}, this clause
7 doesn't mention the peril at all; it just mentions the
8 damage. But it must contemplate encompassing within the
9 damage the cause of the damage so that you don't create
10 a counterfactual which doesn't have the cause.

11 If that is right then you wouldn't expect a clause
12 which is purely addressing quantification, the trends
13 clause, to be introducing it by the back door purely for
14 quantification.

15 LORD JUSTICE FLAUX: How is damage defined in this policy?
16 Is it not defined by reference to damage which is
17 covered by the property damage sections?

18 MR EDELMAN: "Damage", the definition, my Lord, is on page 9
19 of this. {B/17/9}.

20 LORD JUSTICE FLAUX: Okay.

21 MR EDELMAN: If you go back to page {B/17/35} it is:
22 "Damage to property for which we have admitted
23 liability under section 1."

24 LORD JUSTICE FLAUX: Yes. Yes. So it is ...

25 MR EDELMAN: It is because it has been caused by an insured

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

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

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1 rely on, because that shows you the danger of carving up
 2 clauses and creating artificial counterfactuals .
 3 My Lord, sorry, I have taken you all the way up to
 4 4.30, but I hope that wasn't ...
 5 LORD JUSTICE FLAUX: That is absolutely fine. If that is
 6 a convenient moment we will break.
 7 Presumably in logistical terms we get another Skype
 8 invitation tomorrow morning so we just switch this off
 9 rather than leaving it running all night.
 10 MR EDELMAN: I think my understanding is that it is the same
 11 Skype invitation throughout.
 12 LORD JUSTICE FLAUX: It is the same invitation, yes.
 13 MR EDELMAN: So you find the same invitation that you had
 14 before; not a separate one each day.
 15 LORD JUSTICE FLAUX: Okay, that is fine.
 16 We will see you at 10.30 tomorrow morning. Thank
 17 you very much.
 18 (4.31 pm)
 19 (The hearing adjourned until 10.30 am on Tuesday
 20 21 July 2020)
 21
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 23
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